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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 418

THOMAS J. EVANS, JAMES P. TOLIVER, CHARLES W. STOKES and CLARENCE A. LAMBERT, *Petitioners*,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

[illegible]

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IN THE

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No.

THOMAS J. EVANS, JAMES F. TORRANCE, CHARLES W. STICKLER and CLAYTON A. LANDSIDLE, *Petitioners*,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled case on April 21, 1960.

CITATIONS TO OPINIONS BELOW

Opinions of the Court of Quarter Sessions of Dauphin County are reported at 70 Dauphin County Reports 197 and 209, and at 72 Dauphin County Reports 31, and are printed in the Record at 45a, 188a, and 356a.

The opinion of the Superior Court of Pennsylvania is reported at 190 Pa. Superior Ct. 179 (1959), 154 A. 2d 57. The opinion of the Supreme Court of Pennsylvania is printed in Appendix B hereto and reported in — Pa. —, — A. 2d —.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 21, 1960 (Appendix B). Time within which to file this petition was extended by a Justice of this Court on July 7, 1960 to September 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), the petitioners having been deprived of due process and equal protection of the laws under the Federal Constitution in their trials by the Commonwealth of Pennsylvania.

HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal Questions in this case were raised at each stage of the proceeding by various motions, petitions, objections, and appeals, as follows:

1. Motions and petitions to quash the indictments (12a, 32a, 346a, 351a, 421a, 445a).

2. Motions in arrest of judgment and for new trial (67a, 71a, 111a, 115a, 131a, 135a, 166a, 361a, 385a, 431a, 435a, 460a).

3. During trial by exceptions and motions (throughout the Record).

4. By pleadings on appeal to the Superior Court of Pennsylvania.

5. By petitions for allowance of appeals and briefs on appeal in the Supreme Court of Pennsylvania.

The Federal Questions thus raised were disposed of as follows:

1. Opinion denying motions and petitions to quash the indictments, 45a: No mention of federal issues.

2. Opinion overruling motions in arrest of judgment and for new trial, 188a: No mention of federal issues.

3. Adverse rulings on exceptions and motions during trial.

4. The Superior Court of Pennsylvania found generally that petitioners had "a fair and impartial trial," and that "there was no violation of due process of law." *Commonwealth* v. *Evans, et al.*, 190 Pa. Superior Ct. 179 at 268. (Petitioner Torrance's conviction on one count was reversed.) Both dissents referred to the abuse of Constitutional rights in detail.

5. The Supreme Court of Pennsylvania affirmed the decision of the Superior Court per curiam adopting the majority opinion therein. *Commonwealth* v. *Evans, et al.*, —Pa. —, — A. 2d —. (App. B)

THE QUESTIONS PRESENTED

I. Whether due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States was denied to petitioners and whether they were deprived of a fair trial by any or all of the following actions of the Commonwealth of Pennsylvania or its duly constituted officers:

a. By the intense publicity and bias generated by the Governor of Pennsylvania by means of personal television appearances which deprived petitioners of a fair trial upon legal indictments returned by an unbiased grand jury?

b. By the intrusion upon the deliberations of the special investigating grand jury by the prosecuting officers who illegally influenced the grand jurors and illegally and erroneously instructed them on the law?

c. By the inclusion of erroneous legal standards in the indictments, which error was compounded by permitting Commonwealth witnesses to read and interpret law to that erroneous effect?

d. By the failure of the district attorney to obtain leave of court to present the indictments to the grand jury, as required by the law of Pennsylvania?

e. By the trial court's refusal to quash the indictments for any one or all of the grounds recited in a to d above?

f. By the trial court's denial of motions for bills of particulars?

g. By the consolidation for trial of conflicting and repugnant charges, resulting in grave prejudice to the defense and confusion to the jury?

h. By the trial court's admission in evidence of the 258 page grand jury transcript of testimony of defendant John D. Paul as an "admission," when it was in fact a document of self-exculpation and a general accusation against petitioners, and which was in fact illegally used by the trial judge, the prosecutor, the jury, and the Pennsylvania appellate courts against petitioners against whom it was inadmissible?

i. [redacted]

j. By the admission in testimony of the 258 page transcript of self-serving grand jury testimony of a co-defendant as an "admission" only against said co-

defendant, without requiring offers of proof, without deleting irrelevant and inflammatory remarks, opinions, conclusions, and questions by both the grand jury witness and the District Attorney, and without striking such portions from the testimony; by the use of that testimony by the trial judge in his instructions to the jury concerning petitioners, use of it by the Commonwealth in argument on appeal, and by the appellate courts against petitioners, all and each of which deprived petitioners of a fair trial and of the right of confrontation of accusers?

k. By the trial court's permitting the prosecution to present and interpret law to the jury by means of witnesses who read and interpreted inapplicable law and practices to the jury, the witnesses being Commonwealth officials, the Deputy Attorney General of Pennsylvania and the Chief Counsel of the Highway Department, and in addition denying petitioners the right to effectively cross-examine these witnesses?

l. By the trial court's forcing petitioner Stickler to produce documentary evidence in the presence of the jury for which the Commonwealth had not subpoenaed him?

m. By the trial court's allowing the prosecution to present five "rebuttal" witnesses who made judicial confessions of their conspiracies and crimes admittedly completely unrelated to the charges against petitioners, which testimony was intended to and did serve only to inflame and prejudice the jury?

n. By the trial of petitioners before a prejudiced and biased trial judge?

o. By the Commonwealth's permitting to stand the convictions of petitioners upon indictments setting

forth *erroneously* certain legal requisites of a public contract supposed by the grand jurors and the trial jurors to be legal requirements of public contracts, when, in fact, such requirements did not exist, which erroneous standards were compounded by the incompetent testimony referred to in k above?

STATUTES INVOLVED

The statutory provisions involved are Sections 652d, 660.2, 660.4 660.5, 660.6, 660.18, 670-102, 670-103, 670-401 *et seq.* They are printed as Appendix A hereto.

STATEMENT

A. TRIALS AND APPEALS

Petitioners were indicted with five others and tried by jury in the Court of Quarter Sessions of Dauphin County, Pennsylvania, for offenses involving conspiracy, false pretenses, and misbehavior in office. Four of the other defendants were acquitted. One was convicted, but discharged by the Superior Court of Pennsylvania on appeal.

Petitioners were convicted of the following offenses:

1. *All petitioners:* of conspiracy to enter a contract between the Pennsylvania Turnpike Commission, a statutory agency of the Commonwealth of Pennsylvania, 36 Penna. Statutes § 652d, as amended, and the Manu-Mine Research and Development Company to provide underground support for the Northeast Extension of the Pennsylvania Turnpike, without fulfilling certain legal requirements.

2. *Thomas J. Evans and James F. Torrance:* of misbehavior in office (as Turnpike Commissioners) by entering into the contract, by permitting it to become effective, and by making payments for its performance (two counts) (Torrance was also convicted on a third count, but this was reversed by the Superior Court).

3. *Charles W. Stickler and Clayton A. Landsidle:* of obtaining money and property by false pretenses. Count 1—obtaining the contract; Counts 2-17—obtaining of contract payments; Counts 18-21—attempts to obtain contract payments; Count 22—attempt to obtain money not paid (Counts 18-21) by lawsuit. Count 22 was dismissed during trial as to Landsidle. The Court imposed these total sentences:

Evans—3 to 4 years; $5500 fine.
Torrance—3 to 4 years; $1500 fine.
Stickler—5 years; $5500 fine; restitution.
Landsidle—1 year, 10 months to 3 years, 11 months; $1500 fine; restitution.

Motions to quash, for bills of particulars, to dismiss, in arrest of judgment, for new trial, were all denied, as were appeals from some of these motions, as detailed later in this statement.

Appeals from the convictions were made to the Superior Court which discharged one defendant from the conspiracy charge and petitioner Torrance from the third count of the misbehavior charge. The court's decision was 4-3. Two of the dissenting judges would have reversed as to all petitioners; the other would have discharged Torrance, granted a new trial to Evans on all charges, and a new trial to Stickler and Landsidle on the conspiracy charge. *Commonwealth v. Evans, et al.*, 190 Pa. Superior Ct. 179 (1959).

Petitions for the allowance of appeals were made to the Supreme Court of Pennsylvania on numerous grounds, including the points raised here.[1] However, petitioners Evans, Stickler, and Landsidle were granted appeals only as to one error.[2] Torrance was

[1] See p. 3 et seq., *supra*.

[2] Admission of grand jury transcript of testimony of J. D. Paul, a co-defendant, at the trial.

the only petitioner allowed to appeal generally. In a per curiam opinion dated April 21, 1960, a majority of the court affirmed the order and judgments of the Superior Court, adopting its opinion. Two of the justices concurred with the majority as to Stickler and Landsidle, but dissented as to Evans and Torrance.

B. BACKGROUND OF CASE

The charges arose from the execution and performance of a contract awarded by the Pennsylvania Turnpike Commission to Mann-Mine Research and Development Company to drill access holes through the proposed roadbed of the Northeast Extension of the Pennsylvania Turnpike into abandoned mines and to supervise the flushing of fill through these holes into the mines to eliminate dangerous subsidence of the land over which the highway was to run. (Mann-Mine had performed other work for the Commission in an excellent manner, at fair prices, and no allegation to the contrary has been made.)[3]

Petitioners Evans and Torrance were members of the Commission. Petitioner Stickler was the principal stockholder and President of Mann-Mine, and the nephew of the wife of petitioner Evans. (Richard

[3] Mann-Mine performed these other unchallenged contracts for the Turnpike:

(1) 1951-1956—Elimination of tunnel water seepage (4260r-4270r)

(2) 1953—Study of proposed Northeast Extension routes. (4277r, 4990r, 4992r)

(3) 1954—Estimate of value of coal beneath Northeast Extension. (4290r, 4990r)

(4) 1954—Patrol and aerial survey of proposed Northeast Extension. (4290r-4293r, 5010r)

(5) 1954-55—Engineering studies and planning for Northeast Extension.

Evans, now deceased, a vice-president and stockholder of Manu-Mine, was the son of petitioner Evans.) Petitioner Landsidle was the general manager of Manu-Mine from June 1, 1954. Prior to that he was a project engineer for Manu-Mine.

Under the contract, which was approved and authorized by the Commission on February 28, 1955, Manu-Mine was to lay out the drilling pattern, drill the slushing holes, insert and remove casing in the holes, supervise the erection of brattices underground by others, and supervise the flushing by others. (19e) For this work, Manu-Mine was to be paid $12.50 per foot of drilled hole. (19e) In March 1955, work was begun with a Joy 32T drill which could drill 28 feet per eight hour shift. After about a month the 32T was replaced by a Joy BH58 drill, which could drill about 179 feet per eight hour shift. The latter drill was first brought to Manu-Mine's attention by a new employee, Joseph Speicher, in late February 1955. (3706r)

Work under the contract continued until February 27, 1956, (642r); it was cancelled by the Commission on April 25, 1956. (4703r). Under it Manu Mine was paid $6,721,718 to [illegible]drilling 600,060 feet of access holes, [illegible]sing them, and [illegible]pervising the flushing of the voids. (848r). A portion of the Turnpike Extension was still to be drilled and flushed when the contract was cancelled.

On January 21, 1957, the Turnpike Commission, acting on the advice of its consulting engineer, directed the portion of the turnpike which Manu-Mine had drilled and supervised the flushing to be paved with a permanent concrete surface and that a flexible paving be installed on the unflushed portion because of the danger of subsidence in the unflushed portions. (2044r-2059r; 5017r-5021r)

C. THE INDICTMENTS

Subsequent to the termination of the contract, a Special Grand Jury of investigation in Dauphin County, Pennsylvania, convened on October 22, 1956. This was in the midst of the political campaigns of that year. The matter of Manu-Mine's contract with the Pennsylvania Turnpike Commission was presented to the Grand Jury on the same day, October 22, 1956. That evening Governor George M. Leader appeared on a local (Harrisburg) television program and, referring to the new special grand jury, denounced Manu-Mine and the Turnpike Commission chairman, among others, as perpetrators of a swindle, as people who "set out to steal $20,000,000 from it [the Turnpike], and they got $9,000,000 before we could stop them." (17a; App. C)* His other words and the accompanying film were equally inflammatory. On the following night on a news reporter's panel television show, Governor Leader again broadcast his personal interpretation of the situation and scoffed at the possibility (suggested by a reporter) that his broadcasts could influence the grand jury that had just convened. He blamed the alleged swindle on the Republicans and promised an end to it if Democrats were elected in the coming elections. (19a; App. D)*

On January 18, 1957, following these broadcasts and intensive newspaper coverage, the Special Grand Jury returned presentments against petitioners. These presentments erroneously asserted that the Manu-Mine contract had been entered into without certain legal requirements. These were stated to be competitive bidding, retention by the commission of a percentage

* Transcripts of the broadcasts are in the record as referenced above. Petitioners submit as Appendices C and D the actual tape recordings of the telecasts for the convenience of this Court and to preclude any claim that the portions quoted are out of context.

of payment, a renegotiation clause, and a performance bond. [None of these were legal requirements of Pennsylvania law. *Commonwealth* v. *Evans, et al.*; 190 Pa. Superior Ct. 179, 209.] The District Attorney, without obtaining court approval of the indictments as drawn, presented them to the regular Grand Jury, which returned them as True Bills on January 23, 1957.

During the deliberations of the Special Investigating Grand Jury, the District Attorney and the Special Deputy Attorney General of Pennsylvania intruded upon the Grand Jury and instructed them as to the law. (22a)

Motions and petitions to quash the indictments were denied, and the appeals therefrom were denied by the Superior Court as interlocutory. The Pennsylvania Supreme Court refused to allow appeals.

D. DENIAL OF DUE PROCESS

1. The Indictments.

a. Motions and Petitions to Quash

After the indictments were returned against petitioners, each moved or petitioned to quash them because of the virtual certainty that the presentments and indictments were not the free unbiased acts of the Grand Jurors. (12a, 32a, 33a, 346a, 351a, 421a, 445a) The TV speeches of the Governor on October 22 and 23, 1956, and the unlawful intrusion of the Special Deputy Attorney General and of the District Attorney upon the Grand Jury sessions in January 1957, in which they gave the jury advice that should only have been given by the court, and in such a way that it prejudiced the petitioners. Either ground was sufficient in itself to justify quashing the indictments, but both having occurred, the refusal of the trial court to

grant the motions was clear error and allowed the petitioners to be arraigned in complete disregard of their rights under the Fourteenth Amendment of the Federal Constitution.

Petitioner Torrance's motion asserted the additional grounds that the indictments were defective because they alleged that competitive bidding, performance bond provisions, a 10 percent retention clause and a renegotiation clause were "features prescribed by law," which was false, and because the District Attorney did not obtain the required approval of the court before presenting the indictments to the Regular Grand Jury. Both were unconstitutional denials of due process.

On February 18, 1957, all petitions and motions were denied by the trial court. (44a) In an opinion filed on March 8, 1957, the court explained that he felt that the speech of the Governor did not do "such harm . . . as to require" the quashing of the indictments. (45a at 59a) Much of the opinion was devoted to the defendants' right to use a transcript of the Grand Jury minutes that had been inadvertently filed in the court docket.[4] (This transcript included the improper advice given the Grand Jury and indirect references to other such occurrences on other days. See 22a et seq.) The opinion did not discuss any of the other specific grounds raised. Appeals from his orders were denied.

The motions and petitions had indicated to the court the need for that court to investigate the circumstances

[4] Ironically, during the subsequent trial, the trial judge permitted the prosecution to use secret grand jury testimony, despite repeated defense objections, i.e. the transcript of John D. Paul's grand jury testimony.

surrounding the presentments and the indictments by the two Grand Juries involved. Sufficient uncontroverted grounds were asserted, but the trial court simply ignored its duty to protect petitioners against unfounded accusations and to ensure that the charges emanating from the Grand Jury were determined in an atmosphere of absolute fairness, free from the contamination of political vengeance and ambition.

b. Motions and Petitions for Bills of Particulars.

On May 22, 1957, all motions and petitions for bills of particulars by petitioners were dismissed and overruled without opinion (66a, 356a, 430a, 455a), and petitioners were forced to go to trial on indictments that not only misstated the Pennsylvania law regarding Turnpike contracts, but which were mutually contradictory. The indictments severally charged conspiracy, false pretenses, and misbehavior in office. The false pretense charges presupposed the deceiving of persons allegedly part of the conspiracy and allegedly guilty of misbehavior in office, all indictments bearing, of course, on the same contract and connected events. This point is discussed in the following subsection.

c. Motions for Severance.

Petitioners Stickler, Landsidle, Evans, and Torrance, at the very outset of the trial, objected to the consolidation for trial of the false pretense indictments with the conspiracy indictments, and moved that the Commonwealth be required to elect on which of the indictments it would proceed. The grounds for the motions were evident on the face of the indictments: in the false pretense cases, petitioners Stickler and Landsidle are charged with duping Evans and Torrance, as

Turnpike Commissioners, in obtaining the contract and payment thereunder, while in the conspiracy case, it is charged all of these men and others *conspired together* to defraud the Pennsylvania Turnpike Commission by means of the very same contract and payments. Joinder of the false pretense charges with the misbehavior in office charges produced the additional anomaly that Evans and Torrance as Commissioners were charged with "knowingly, wilfully, and corruptly permitting" a fraud while Stickler and Landsidle under the other indictment were allegedly executing the same fraud by false pretenses.

Thus, the petitioners, after being indicted in an atmosphere of public and political hostility by Grand Jurors who certainly were influenced by the Governor's TV "conviction" and by the "advice" given them by the Deputy Attorney General and the District Attorney, and after being refused bills of particulars, were forced to defend themselves at a mass trial against conflicting and contradictory charges. Their defenses were not only unfairly complicated, but they were certain to be exposed, to their prejudice, to testimony applicable to less than all the defendants that could not be removed, as to them, from the jurors' minds by any limiting instruction. In the seven-week trial, the longest in Dauphin County history (6354r), that ensued, this inevitable result occurred.

The most glaring example of the use of evidence purportedly limited to one defendant that resulted in grave prejudice to petitioners was the admission of the Grand Jury transcript of testimony of John D. Paul, who did not take the stand at the trial, one of the defendants acquitted at the trial. It was characterized

by the Commonwealth as an "admission" or "confession"—258 pages long—of Paul's guilt of the conspiracy charge. (2660r-2918r)

This transcript should have been excluded as not being a confession or admission. This point will be discussed later in this Petition. (See 2a, infra.) Assuming it to be admissible as a confession or admission, it was clearly prejudicial to the other defendants in the false pretense cases because of the joinder. Proof of this is to be found in the Trial Judge's charge to the jury, in which he referred repeatedly to Paul's testimony when discussing the false pretense charges. (6434r-6436r, 6446r-6447r, 6474r-6457r) If the trial judge, who told the jury to apply Paul's testimony only to him (2658r), could not follow that instruction, could the jury?

2. During Trial

The pattern of due process denial that characterized the pre-trial stages of the prosecution marked the trial itself. It became more glaring and more offensive to Petitioners' Constitutional rights. The trial judge and the district attorney combined in disregarding fairness and the rules of evidence and drove the possibility of a fair trial for petitioners out of the courtroom.

a. Admission of the Transcript of Grand Jury Testimony of John D. Paul.

The District Attorney presented and the trial judge admitted, over petitioners' vigorous objections (2649r. et seq.), 258 pages of testimony given by John D. Paul, a defendant and Turnpike employee, before the Grand Jury. The testimony was that of a man trying desperately to exonerate himself and willing to accuse any-

one to avoid accusation against himself.[5] His answers to questions either blackened the petitioners or agreed spinelessly and untruthfully with loaded questions of the District Attorney pointed at the petitioners. No other view can be obtained by anyone reading the transcript. *And this transcript was admitted as a confession or admission by Paul.* It was in fact an accusation.

Petitioners' requests for offers of proof before and during the reading of these 258 pages of self-purification were curtly denied, (2649r et seq) the trial judge even going so far as to declare that he was leaving the relevancy of the testimony to the District Attorney. (2724r)

The District Attorney took full advantage of the trial judge's confidence in him. Under the double-fiction of presenting a "confession" or "admission" only to be considered against Paul, he brought to the jury accusations, insinuations, opinions and hearsay,[6] both

[5] A typical example: "Q. You mentioned this morning that Mr. Evans was interested, you used the word 'interested' in that matter, and you didn't go along with him, he demonstrated his interest, did he not? A. Why, yes, sir, very forcibly, insofar as most things were concerned at least, here is the superior being of the Turnpike Commission, this is a job he wants done, here is the people he wants to employ, that is it." (2728r)

[6] Mr. Justice Bell in a concurring and dissenting opinion in this case, ... Pa. .... (App. B), stated:

"John D. Paul was indicted as one of the conspirators. Paul's testimony before the Grand Jury (. . .) was admitted in this trial and was read in full to the jury under the theory that it was a confession or a so-called admission against interest and was therefore admissible against him. It was certainly not a confession and it is likewise questionable whether it rose to the height of an admission against interest. Paul was acquitted. The vice of Paul's Grand

Jury testimony was two-fold: (1) it contained highly incompetent testimony, hearsay testimony, and his *guesses*, inferences, conjectures and conclusions, and (2) it was *highly prejudicial to Evans*. Paul's testimony was in reality an attempt to incriminate the other defendants, particularly Evans. In order to determine how highly prejudicial to Evans some of Paul's *grossly* incompetent testimony was, I shall quote a few excerpts therefrom:

"'Q. Have you given any consideration to the timeliness of August 25th, 1953, and September 1953, in the light of events that have later occurred?' A. 'Frankly, no, as of this minute I had not.' Q. Does it seem to you *as of this minute* that there is any significance to attach to those two periods of time? A. There might have been. Q. *What might have been?* A. It might have been in somebody's mind; certainly not mine. Q. Well, what might have been in someone's minds that you can think of at this point that *might excite your curiosity?* A. My curiosity now has been developed somewhat by the coincidence, we will call it, of those two dates, insofar as perhaps later activities of Manu-Mine *might have been concerned in somebody's mind*. Q. *What mind are we thinking of* at this moment, sir, that is particularly attractive to your thinking at this moment; what mind would you be attracted to? A. *The only mind* that I would know *that might be at all interested* in Manu-Mine *would be Mr. Evans*, Chairman of the Commission. . . . Q. What would that have possibly entailed if you had given such consideration to those thoughts that would have come through your mind? A. Well, undoubtedly I would have been told that, maybe rather broadly, that it was none of my business, or something like that. Q. In order to convey it to the Grand Jury, we have to do it through what you were thinking. We have to convey it by words, and you have done it very descriptively. Do you think this was a foregone conclusion that Mr. Stickler was going to operate in this field and all you could do was go along with it? A. Well, to what extent Mr. Stickler was received, I think that that was a pretty foregone conclusion that he would get the job. . . . A. . . . and someone besides Mr. Evans, I believe it was Mr. Torrance, and the question was: 'Don't you think we ought to do something about the Department of Mines on this case?' Q. Who made that statement, sir? A. I believe it was Mr. Torrance. . . . Q. What was Mr. Evans' reaction to Mr. Torrance's inquiry? A. 'No, we don't want that.' . . . Q. Mr. Evans did not want the Department of Mines in

this matter, did he? A. No. Q. That was pretty definitely understood by you, was it? A. *I had that impression.* . . . Q. *Why did you conclude* that Mr. Evans didn't want the Department of Mines involved in this? A. Well, actually I don't think I examined *his motive* for thinking so at the time. Q. *Have you since that time examined it?* A. Oh, I thought about it a great deal in the past six or eight months. Q. *What has been the conclusion that your thinking has resolved itself into,* sir? A. Simply this: That the Department of Mines presumably has in its possession or in its record a full supply of maps of all mining work; and that information should be available alone. Now, the question of whether to employ Department of Mines personnel, whether that could be done or not, is quite another story, or was in my mind then. Since then it has, of course, been done, and we employed—I mean the Commission paid for their assisting personnel. So that it no doubt would have been just as possible earlier as it was later. Q. Let's give it a little more validity, sir, to the conclusion, I believe. Isn't this a fact: If the Department of Mines had been consulted it would have done just what it has already done and there wouldn't be any Manu-Mine contract? A. I believe that is a fair statement. Q. In other words, Manu-Mine couldn't have gone into a contract that more than $10 million had been paid on if the Department of Mines had been consulted, *isn't that a fair conclusion?* A. *I think so.* Q. So, therefore, Mr. Evans didn't want the Department of Mines involved in this matter, did he? A. That was clear enough to me. Q. So if the Department of Mines had been involved, Mr. Evans' nephew would not have been involved, is that right? A. I think that is true too. . . . Q. We want to know why, sir. Do you have a reason to ascribe for that? A. The only reason I can ascribe to that is that Mr. Evans might have thought that I would get the contract set up perhaps sooner than Mr. Stone, or something like that; *maybe he had a special purpose in the back of his mind at the time.* Q. *What could that have been?* A. Well, probably another purpose which could have been in the back of his mind was that I was the man who would, say, be duped, put it that way, or, at least, carry out his order to his satisfaction. Q. In other words, or have you now concluded that Mr. Evans did think that he might more easily have you handle the contract of February 28, 1955, than Mr. Roger Stone? A. I would conclude that, yes, sir. Q. There is a reason, isn't there, sir, for most every bit of human conduct? A. Correct. Q

of Paul and of the District Attorney, hostile to the petitioners, which were not subject to objection or cross-examination, because John D. Paul did not take the witness stand and subject himself to cross-examination. None of the petitioners could cross-

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You have ascribed that as a reason, and you have had an opportunity to reflect on it, have you not, sir? A. Yes, sir. Q. That is your considered opinion this afternoon, isn't it? A. Yes, sir, I think so. . . . Q. Did you conclude at that time that Mr. Evans did not want any other drillers in there because there would have been a competitive bidding on that amount of work which would have contrasted to the $12.50 per foot that Manu-Mine was making? A. *At this juncture I would say yes.* Q. Isn't that the reason why no further drillers were brought into that area? Didn't Mr. Evans make it pretty clear to you if any other driller was brought in there there might be a question concerning the $12.50 per foot? A. I would gather that much very clearly, that if anything like competitive bidding was accomplished that that figure might be reduced. That is my opinion; yes, sir. Q. Therefore, you would conclude from that that Mr. Evans gave the instruction to go ahead and drill, and drill regardless of the cost, isn't that right? A. Yes, sir. . . . Q. Other than that, you felt the influence that Mr. Evans exerted was a primary motive behind this contract for renegotiation? A. Yes, there is no doubt about that. Q. And from decision by Mr. Evans you had no redress? Did he have other Commissioners under his thumb, in your opinion, as he had the department heads? A. Mr. Evans as I have said dominated the Commission. He got what he wanted and that refers to the other members of the Commission as well, by one method or another. Somehow whatever he wanted to do the Commission agreed to do.'" [N.B. The dates August 25, 1953 and September, 1953 were insinuated by the prosecutor's questions to show that Paul's promotion to assistant chief engineer in charge of construction coincided with Manu-Mine's initial letter to the commission on August 25, 1953, it being asserted by the prosecutor and corroborated by Paul that he was promoted in September, 1953. (2678r) But Turnpike records showed that Paul's promotion occurred on November 3, 1952. (5096r.)]

examine a transcript or object because it was not to be considered against them.

The joint trial and the misjoinder of charges compounded this gross injustice. The trial ran seven weeks and this transcript was read in the first half of the trial. No attempt was made to set it off from the other evidence applicable to the other eight defendants. Instructions by the judge to the jury to limit its effect to Paul were a mockery of the rule. He cited the transcript as evidence for various aspects of charges against the petitioners, then "cautioned" the jurors that such testimony was applicable only to Paul, a useless bow to petitioners' rights.

An example of such an instruction can be found at pages 6434r-6436r:

> "Joseph E. Speicher was the drilling superintendent of Manu-Mine, and you will recall how he described the drills: One was a light 32 and one was a big BH58. We are speaking from memory. We are not construction engineers. You will recall Speicher said, at least I think he said it, that this big BH58 could drill much more quickly and more deeply in an eight hour shift than the light 32 drill. I will leave that with you jurors to differentiate between the drills. The testimony is Speicher was in charge of the drills, and I believe he is the one that went out and located that big BH58 drill which enabled the Manu-Mine Company to drill much more footage than they would have drilled had they continued to use the one 32 light drill that is mentioned in *the letter of January 6, 1955, which they sent to the Commission—I think to John D. Paul*—saying, "We can drill so much a day'—'25 or 28 feet'—'with the light drill', and *I think Paul's testimony is, as given to the Grand Jury, and applicable to him alone, as we said, that he relied on that.* Then I believe

there is testimony—we leave that to you—that *while that representation was being made, if it was made—that is for you to decide—to Mr. Paul*, that the Manu-Mine Company had already lined up this big BH58 drill. I believe it is the Commonwealth's contention that was an element of deceit. If they knew they were going to use a big BH58, by representing to the Commission that they were going to use a smaller, lighter drill, the Commonwealth's contention is, as I recall it, by knowing that they were going to use a big drill, that they would drill deeper and have more footage, they would make more money at $12.50 a foot, *but they did not tell that to Mr. John D. Paul when they were representing to him what it would cost to drill.* That is up to you members of the jury. I am just giving you my own recollection of the testimony. If I am in error, I am sure counsel will correct me at the end of this charge. Whether he did make that representation or whether he did not, or whether the Manu-Mine Company knew then that they had a B58 lined up or whether they didn't, that is all for you on the matter of credibility." (Emphasis added)

Other references of the same character may be found at 6446r, where the judge after referring to Paul's testimony in discussing the case against Mr. Landsidle and "excluding" it as to Landsidle and Stickler concluded:

> "You must take *all that* into consideration when you pass on the two cases in which Landsidle is a defendant, a defendant in the conspiracy case as well as in the false pretense case." (6448r) (Emphasis added)

Another charge of this nature appears at 6474r.

At 6484r, the trial judge, who commented on each witness in his charge and on the evidence, blandly ad-

mitted, after objections by defense counsel, that he used his "feeble memory" to review the case to the jury and that the jurors should not rely upon his recollection, because he had made numerous misstatements of facts.

In addition to these prejudicial charges, Paul's testimony was used prejudicially against petitioners in the State's argument to the jury, and before the state appellate courts, in the trial court's opinion denying Motions in arrest of judgment and for new trials (216a-220a), and in the opinion of the Superior Court (190 Pa. Superior Ct. 179) which was adopted by the Supreme Court of Pennsylvania in this case.

The evil of the admission of the transcript into testimony was compounded by many factors:

1. The misjoinder of offenses,
2. Denial of bills of particulars,
3. Refusal to require offers of proof,
4. Lack of copies of transcript at trial (only Paul's counsel had a copy).
5. Inclusion of numerous conclusions, opinions, and insinuations of the District Attorney and the Deputy Attorney General in the transcript,
6. Inclusion of completely irrelevant but prejudicial opinions, thoughts, and suppositions of Paul as to the thoughts and motives of others,
7. *Denial, by use of this transcript, of petitioners' rights to due process, to confront accusers, and to cross-examine witnesses against them.*

b. Admission of Testimony As to the Law of Pennsylvania

In still two other instances the trial judge gave free rein to the prosecutor and in effect let him use two witnesses to exercise the primary function of the judge himself: the presentation and interpretation of the law to the jury.

Harrington Adams, the Deputy Attorney General of Pennsylvania, took the stand to read portions of the Pennsylvania statutes pertaining to the Turnpike Commission (Turnpike Act, as amended, 36 P. S. 650.1 et seq.) portions carefully selected by the prosecutor (391r-415r). To the jury the witness appeared as a spokesman for the Commonwealth. The laws he read applied to "construction" contracts, in support of the Commonwealth contention that a "construction" contract and not an "engineering" contract (not subject to bidding, etc.) was involved. This Court warned against the danger of such a witness in *Ennis* v. *Smith*, 14 How. 400, 426.

The trial judge's admission of this testimony was rendered even more prejudicial when, despite persistent defense requests, he refused to rule whether the contract was one for construction or not. Indeed, he left this question of law expressly to the decision of the jury. (6414-20r)

Having been permitted to load the case in this way against petitioners, the District Attorney, without hindrance from the judge, went one step further with his next witness, John R. Rezzolla, Jr., Chief Counsel of the Pennsylvania Department of Highways. Rezzolla did not just read and interpret statutes to the jury (437r); the statutes he discoursed upon were expressly inapplicable to the Turnpike. He read the *Highway Department Act (Act No. 428, 36 P.S. 670.101-670.1402)*, and then explained Highway De-

partment procedure thereunder but he expressly failed to read or explain the following portion (36 P.S. § 670-103) of said act.

> "This Act does not include any provisions of, and shall not be construed to repeal:
>
> * * * * *
>
> "(4) Any law administered by the Pennsylvania Turnpike Commission . . . ."

The Turnpike Act contains no provisions for competitive bidding or bonds in letting contracts. Under it the Commission has full discretion in awarding contracts, subject only to obtaining the approval of the Department of Highways for construction contracts. If it was a construction contract, approval of the contract in controversy was given by Joseph J. Lawler, Secretary of Highways, when he voted for the contract as an *ex officio* member of the Turnpike Commission (604r-607r). That the contract bidding and bond requirements were inapplicable to the Turnpike Commission at the time in question was confirmed by Superior Court in this case. 190 Pa. Superior Ct. 179, 209.

In permitting Adams and Rezzolla to testify, the trial judge allowed the prosecutor to take over the trial and to present to the jury law and an interpretation thereof that was inapplicable to the case. What law was presented was incomplete and viciously misleading. What the District Attorney did was tailor the Pennsylvania law to his theory of the case, and, with the outrageous acquiescence of the judge, lead the jury to believe that this was the law of the Commonwealth squarely applicable to the charges against petitioner. Why is a judge on a bench, if he is not there as the authority on the law, and to see that law is correctly applied to the persons on trial?

c. Court Ordered Petitioner Stickler in Front of Jury to Produce Business Records

The Commonwealth had subpoenaed Clyde J. Siegfried, the Manu-Mine Controller, to appear and bring with him certain Manu-Mine business records. (2931r) At that time these were in the possession of Mr. Stickler, so Siegfried was unable to produce them. (2932r) Stickler was not subpoenaed to produce them. The trial judge ordered Mr. Stickler to produce these documents immediately in the court before the jury, refusing to require the Commonwealth to give notice or to make an offer of proof and to specify or describe the documents desired, except as they were set out in the Siegfried subpoenas. The rights of the petitioner were called to the judge's attention, but he refused to consider them. All of this took place in front of the jury. (2931-6r)

d. Introduction of Evidence of Conspiracies and Frauds Completely Unrelated to the Charges and the Petitioners

Petitioner Stickler on cross-examination denied that his firm Manu-Mine was able to find proof of certain alleged wrongdoings by employees who supervised the slushing operations. (4709r-4710r) Defense witness Luke, a Manu-Mine employee, also stated he had no knowledge of such wrongdoing. (3291r)

In rebuttal, the prosecution put five ex-Manu-Mine inspectors on the stand. (5796r et seq) These men made judicial confessions of conspiring with George D. Oswald [7] of Rogers Brothers Construction Company to issue false weight slips for till that was never deliv-

[7] A prosecution witness who testified about slushing. He did not mention his own crimes, and petitioners, being without knowledge of them, could not impeach him.

ered. None of the witnesses attributed any knowledge of the crimes to Stickler or Luke, and all admitted affirmatively concealing the crimes from Manu-Mine. (5834r, 5843r, 5864r, 5874r, 5894r, 5900r)

This evidence was a clear violation of the rule prohibiting evidence of unrelated crimes. It is a forceful demonstration of the purpose of that rule. It served, as the prosecution intended, to anger and prejudice the jurors.

REASONS FOR GRANTING THE WRIT

It is a well-known and honored principle of this Court that in reviewing cases from the courts of the States, it does not invade a State's sovereignty by prescribing the procedures that States must use to afford due process of its citizens. Particular cases are examined for the existence of due process. If this Court finds that due process is lacking, it indicates this defect and directs the State to correct it. Concisely, the United States Supreme Court guides the States in the area of the Fourteenth Amendment, whereas it supervises the administration of Criminal Justice in the Federal Courts in the due process area of the Fifth Amendment. See *Brown* v. *Mississippi*, 297 U.S. 278. See also *Elkins and Clark* v. *United States*, No. 126, October Term, 1959, — U.S. —, 28 Law Week 4567, in which this Court ruled inadmissible in a federal court evidence obtained in violation of the Fourteenth Amendment.

Accordingly, petitioners here are not attacking the processes of justice of the Commonwealth of Pennsylvania. They are asserting that in the specific circumstances here they were denied due process, that several errors of omission and commission were made by the

Commonwealth of Pennsylvania through its Governor, its prosecutors, and its courts, which individually and collectively denied petitioners the sacred protection of the Fourteenth Amendment to the Federal Constitution.

Some of the errors that robbed petitioners of these rights are so unusual, so unprecedented that only the intervention of this Court can correct them, can prevent them from achieving a status of legality under the law of Pennsylvania, and eventually under the laws of other States. Petitioners believe that the denial of their rights was so offensive to the Constitution that that alone will merit this Court's attention, *but, with conviction*, petitioners believe that extremely important Constitutional questions are involved that demand the decision of this Court to preserve fair trials in the Commonwealth of Pennsylvania and in her sister States.

Chronologically, the errors which denied due process to the petitioners were:

1. On the very day of, and the day following, the assignment of this case to an Investigating Grand Jury, the Governor of the Commonwealth appeared on two television programs and told the people of Pennsylvania by word and picture that petitioners were irrefutably guilty of stealing from the Commonwealth. This was preceded and succeeded by intense newspaper publicity.

2. Fictitious "legal" requirements for the contract involved were written into the presentment of the Investigating Grand Jury and preserved in the indictments by the District Attorney's failure to obtain court approval of the indictments as drawn before submis-

sion to the regular Grand Jury, and the error was compounded by the prejudicial erroneous testimony of Commonwealth witnesses. See No. 8, *infra*.

3. The District Attorney and the Special Deputy Attorney General intruded upon the deliberations of the Special Investigating Grand Jury and in addition instructed that jury on the law, and otherwise influenced it contrary to the laws of Pennsylvania.

4. Motions to quash the indictments and subsequent motions for bills of particulars were denied, and appeal at that time was also denied. (These motions were based on the errors cited above, among others.)

5. Trials of nine defendants on three different and conflicting charges, some involving 22 counts, were consolidated.

6. The trial court allowed the Commonwealth to read in evidence the transcript of grand jury testimony of Paul, a co-defendant, as an "admission" only against him, which testimony was exculpatory of himself, accusatory of petitioners, and inflaming to the jury.

7. Both the trial judge in his charge and the prosecutor in his argument used Paul's testimony against one or another of the petitioners. The trial court used it illegally again in denying a new trial, as did the Superior Court of Pennsylvania, in the majority opinion.

8. Witnesses, high officials of the Commonwealth, were used to present and interpret state law to the jury, and petitioners were denied their right to effective cross-examination.

9. The trial judge forced petitioner Stickler in front of the jury to produce his company's business records for which the Commonwealth had subpoenaed the wrong person.

10. The trial judge allowed the Commonwealth to present witnesses to the jury who testified about their own crimes and conspiracies which had no connection with the charges in the case.

11. Besides the bias shown in the course of the trial judge's errors enumerated above, his general treatment of petitioners and defense counsel demonstrated his prejudice against them and the impossibility of a fair trial.

1. The Governor's Television Broadcasts

An article in the August 1960 issue of The American Bar Association Journal by Justice William O. Douglas, *The Public Trial and the Free Press*, pinpointed the prejudicial effectiveness of television.

> "... The television trial may produce evidence to convict the witness; and *it may so saturate the country with prejudice against an accused that a fair trial may be next to impossible....*" (Emphasis added)

Mr. Justice Douglas was considering specifically the televising of Congressional hearings, but what he said can be applied with equal truth to a Governor's televised presentation of his views of a criminal case. In this case, Governor Leader unequivocally convicted petitioners of stealing $9,000,000 from the Commonwealth and attempting to steal $11,000,000 more. He insinuated that he relied upon "a great body of information," that he had "only scratched the surface," that the Grand Jury would reach "a logical decision." (17a, 19a, App. C, D)

Had the Governor gone before the Grand Jury in person, he could not have more effectively controlled the result reached by that body in recommending the

indictment of the petitioners. Its eventual decision became a foregone conclusion. The Governor had issued a mandate to indict.

What fair trial was possible after such a beginning? The Governor's telecasts amounted to a promise that the Pennsylvania juries and courts would indict and convict petitioners. And these telecasts were merely the main eruptions of a continuous glare of publicity, including coverage in a national magazine.[5]

So unusual was the Governor's action that petitioners are unable to find a case of similar activity by such a high official. In *Shepherd* v. *Florida*, 341 U.S. 50,[6] newspapers reported that the sheriff stated that the defendants had confessed. No confession was produced at trial. In an opinion concurring in the result, Mr. Justice Jackson called the trial "but a legal gesture to register a verdict already dictated by the press and the public opinion it generated." Id. at 51. If the press is prohibited from dictating a verdict, where does a Governor using a media of mass communication stand?

A closer analogy occurred in *Delaney* v. *United States*, 199 F.2d 107, (C.A. 1) In that case a congressional investigating committee caused intense publicity, on television, in newspapers, and in a national magazine in investigating the circumstances connected with charges of bribe taking and making false certificates against an Internal Revenue Service official. The indictments there occurred prior to the committee's

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[5] *Saturday Evening Post*, June 28, 1958.

[6] Reversed per curiam for exclusion of Negroes from the grand jury.

investigation. Denial of a third continuance because of the publicity was appealed and reversed by the First Circuit Court of Appeals because of the unlikelihood of a fair trial and especially because the Government was itself responsible for the publicity. *United States* v. *Florio*, 13 F.R.D. 296 (D.C., S.D.N.Y. 1952), reached the same result in a similar case citing Delaney and finding no distinction therefrom because the publicity had been generated by a New York state agency. *United States* v. *Dioguardi*, 147 F. Supp. 421 (D.C., S.D.N.Y.), a case connected with the blinding of Victor Riesel, was continued because of intense publicity in a connected trial.

Petitioners here did not move for continuance. They moved to quash on this ground and the Trial Court's denial of the motion, stating that the Governor's speeches did not do "such harm . . . as to require" the quashing of the indictments (59a) showed petitioners the hopelessness of moving for a continuance.

No grand jury having been so dramatically made aware of their Governor's views could be unbiased.

Costello v. *United States*, 350 U.S. 359, at 363, states the Constitutional requirement for indictments: "An indictment returned by a legally constituted and *unbiased* grand jury, ... if valid on its face, is enough to call for trial of the charge on the merits." (Emphasis added.)

In *Ciucci* v. *Illinois*, 356 U.S. 571, 573, Mr. Justice Harlan and Mr. Justice Frankfurter, concurring with the majority in the 5-4 affirmation of a conviction, indicated they would have considered the possibility of newspaper articles creating "fundamental unfairness," had the issue been raised below. In that case,

the defendant killed his wife and three children, but was tried separately for each. The first trial resulted in a twenty-year sentence, and the second in a forty-five year sentence. Following the second trial Chicago newspapers carried articles "attributing to the prosecution certain statements expressing extreme dissatisfaction with the prison sentences fixed by the jury and announcing a determined purpose to prosecute petitioner until a death sentence was obtained." The third trial drew a death verdict. See also *Coppedge* v. *United States*, 272 F.2d 504 (C.A.D.C., citing *Marshall* v. *United States*, 360 U.S. 310, and see also *United States* v. *Powell*, 171 F. Supp. 202 (D.C., N.D. Calif. SD).

2. Fictitious "Legal" Requirements

The indictments against petitioners stated that certain "legal" requirements, i.e., competitive bidding, retention of fixed percentages, performance bond, negotiation clause, were omitted from the contract that is the backbone of this case. The Superior Court expressly held (*Commonwealth* v. *Evans, et al.*, 190 Pa. Superior Ct. 179, 200), that the Turnpike Commission statute did not require these things and that court further assumed, at page 200, that they were not "legal" requirements. The Superior Court, whose opinion was adopted by the Pennsylvania Supreme Court, found that the controversial wording of the indictments was surplusage, that these factors were a "usual practice" of the Commission and sufficient in that sense in order to support convictions under the indictments. Evidence at the trial left this point in such uncertainty that the trial judge left it to the jury as a question of fact, i.e., whether these were legal requirements of a Turnpike contract (an error in it-

self), but, assuming it to be correct *arguendo*, it deprived petitioners of due process because it permitted conviction upon a charge not made. The indictment uses the words "required" and "legal" repeatedly, words which can have no other connotation but to indicate that the law expressly provided certain requirements. Otherwise, petitioners were tried for a failure to observe an unsanctioned practice or custom. The result is that they were convicted on charges not made, that an element of the charged offenses was ruled surplusage.

The controlling principle here is that of *Cole* v. *Arkansas*, 333 U.S. 196, in which the defendants were convicted of assembling unlawfully to prevent workers from working. Their convictions were affirmed under another law prohibiting the prevention of workers from working by means of force or violence. This court reversed, holding that the State Supreme Court's decision amounted to a conviction without trial or notice. In *Thornhill* v. *Alabama*, 310 U.S. 88, this Court stated, "'Conviction upon a charge not made would be a sheer denial of due process.' *De Jonge* v. *Oregon*, 299 U.S. 353, 362; *Stromberg* v. *California*, 283 U.S. 359, 367."

3. Intrusions Upon the Special Investigating Grand Jury. Unlawful Instructions to the Special Investigating Grand Jury on the Law.

Under Pennsylvania case law the prosecutor's duties in relation to a grand jury are clearly delineated. He is to aid in the examination of witnesses, give such general instructions as may be required, "but he must not attempt to influence their action nor indeed should he be present while they are deliberating on the evidence or voting on a matter under investigation." *Common-*

wealth v. *Bradley*, 126 Pa. 199, 205 (1889); *Commonwealth* v. *Brownmiller*, 141 Pa. Superior Ct. 107, 113 (1940); *Commonwealth* v. *Judge Smart*, 368 Pa. 630 (1951). That the court gives the grand jury the applicable law was a rule concretized early in Pennsylvania law by *Commonwealth* v. *Crans*, 2 Clark 162; 3 Pa. L.J. 442 (1844).

Thus, regular Pennsylvania procedure was not followed by the prosecutors in this case. They both intruded upon the deliberations of the grand jury, *and* usurped the court's function by advising the grand jury on the law. See the following subsection). Once again petitioners were denied due process and equal protection of the laws.

4. Denial of Pretrial Motions.

Due process of law was denied to petitioners by each of the errors discussed in 1, 2 and 3 above. To obtain relief from this denial, petitioners made pretrial motions to quash and for bills of particulars citing as the basis therefor the denial of their Constitutional right to have their alleged offenses investigated by an unbiased grand jury. *Costello* v. *United States*, *supra*. The motions were severally denied. In denying the motions to quash, the trial court wrote an opinion. (45a) This opinion characterized the intrusion upon the grand jury as the giving of instruction and advice upon the grand jury's request (51a), stating the court could not do so "without violating the secrecy of the proceedings." (51a) If the court would have violated the secrecy of these proceedings, how is it that the prosecutors did not? Furthermore, this opinion paradoxically admits that the prosecutors instructed the grand jury on the law, stating that "these officials" in

"answering certain inquiries of the Grand Jury *concerning some legal aspects of the case*," gave answers based on hypothetical facts. (49a-50a)

Admitting that the Governor's speeches had a "highly political flavor," the court nonetheless found that there was no "reason to believe" that the grand jury was biased by it. But the motions had requested the court to "inquire into the circumstances and the character of the speeches, as well as the actions of the District Attorney and the Special Deputy Attorney General, in deciding the motions. This the court failed to do, despite the obvious evidence of the harmful effect of these circumsances.

Another ground for quashing the indictments lay in the fact that the District Attorney presented the indictments to the indicting grand jury without obtaining "leave of court," that is, approval of the proposed indictments. That such procedure is required under Pennsylvania law is stated in *Commonwealth* v. *Wilson*, 134 Pa. Superior Ct. 222 (1938), which ruled in a case also involving alleged corruption in office and also involving a special and a regular grand jury as here, that leave of court must be obtained before a district attorney could present an indictment or witnesses pertaining thereto to the regular grand jury.

By denying the motions to quash, the trial court again denied to petitioners due process of law and the equal protection of the laws.

5. The Consolidation for Trial

Petitioners objected to the Commonwealth's motion to consolidate the charges for trial, but the trial court overruled the objection. All four petitioners with five other defendants were tried for the conspiracy although

the proof varied as to individuals because of varying individual facts. In addition, petitioners Evans and Torrance were tried for misbehavior in office despite the fact that much of the evidence connected with the conspiracy related to periods of time *after* they were out of office. Finally, petitioners Stickler and Landsidle were tried on the false pretense charges, which not only added to the confusing jumble of evidence presented to the jury, but which indictments were repugnant on their facts to the conspiracy charges. The false pretense indictment (Count 1) alleged that *by use of false pretense* petitioners Stickler and Landsidle "unlawfully and feloniously obtained the signatures of T. J. Evans, James F. Torrance, and Theodore S. Paul of the Turnpike Commission," all of whom were alleged in the conspiracy indictment and tried as co-conspirators. There is no doubt that both alleged offenses could be said to arise from the same circumstances, but it defies logic and a man's ability to defend himself to accuse a man on one hand of conspiring to do an unlawful act, and on the other to accuse him of getting his co-conspirators to do it by fraud and false pretense.

The remaining twenty-one counts allege the false pretense (to obtain contract payments) as made against the Turnpike Commission, not alleging names of members, but two of the Commission members and several Commission employees (for most of the period involved) were alleged co-conspirators.

Such a joinder in and of itself deprived petitioners of a fair trial. The conspiracy was repugnant to the false pretense charges and vice versa. And the false pretense was also repugnant to the misbehavior in office charges, in that it charges Evans and Torrance

with "knowingly, wilfully and corruptly" doing what Stickler and Landsidle are accused of tricking them into doing.

McElroy v. *United States*, 164 U.S. 76, at 80, states the general rule on joinder: ". . . joinder cannot be sustained where the *parties are not the same* and where the offenses are in nowise parts of the same transaction and *must depend upon the evidence of a different state of facts* as to each or some of them." (Emphasis added)

The Pennsylvania cases support this rule, leaving the decision to the trial court's discretion. Abuse of this discretion is ground for reversal. *Commonwealth* v. *Mulroy*, 154 Pa. Superior 410; *Commonwealth* v. *Dixon*, 179 Pa. Superior 1.

That the trial judge in this case clearly abused his discretion is evident from the facts set out above and from the record of the seven week trial in which multitudinous evidence was presented which applied to some or one defendant only or to some or one charge only. The most glaring examples of this were the Grand Jury transcript admitted only against John D. Paul (see subsection 6 and 7, infra) and the rebuttal witnesses who testified about their own crimes allegedly to rebut the testimony of one defendant and one defense witness as to one point (see subsection 8, *infra*).

6. Admission of Grand Jury Transcript

Over petitioners' repeated objections and refusing their requests for offers of proof and deletion of prejudicial portions, the trial court allowed the Commonwealth to have the 258 pages of grand jury testimony of John D. Paul, a co-defendant in the conspiracy case, read to the jury. The nature of this alleged "admis-

sion" and its harmful effects were discussed above at p. 15 et seq.

Paoli v. *United States*, 352 U.S. 232, although dealing with a federal case, sets forth standards of fairness that should be applied in appraising the due process aspects of the admission of this evidence. First of all an admission by one co-defendant after the termination of a conspiracy is inadmissible against his co-defendants and the judge must instruct the jury accordingly, 352 U.S. at 237. But other factors caused this Court to approve the admission in the *Paoli* case. The facts of the conspiracy were simple and easily understood by the jury; the evidence of guilt *aliunde* the confession was sufficient to convict. There was no indication of jury confusion; it was not a mass trial; there was no multiplicity of evidentiary restrictions, 352 U.S. at 241-2.

In this case the alleged facts of conspiracy were complicated; that the evidence *aliunde* the admission was sufficient is questionable. The jury was confused as may be deduced from the fact they acquitted Paul who was the only defendant who had made "admissions"; it was a mass trial; and there was a multiplicity of evidentiary restrictions because of the varied defendants, charges, and evidence.

Moreover, only Paul's counsel was given a copy of the transcript and then only a few pages at a time. The trial judge refused to screen the transcript in advance to protect the co-defendants. Finally, the trial judge vitiated whatever limiting instructions he gave to the jury by repeated illegal use of that testimony against other defendants in his charge. Compare this with the trial court's handling of a 42-page grand jury transcript in *United States* v. *Baudo*, 244 F. 2d 833

(C.A. 2); cert. den. 355 U.S. 844, in which it was held error to admit the transcript without deleting the co-defendant's name. The error was held harmless because of *other conclusive proof of guilt* and because of an adequate jury instruction. It is noteworthy that the trial court in that case had the transcript read into the record in the absence of the jury before it was read in open court and that all defense counsel were provided with photostatic copies in advance.

The Commonwealth's only purpose in offering the transcript testimony was to deprive the other defendants of a fair trial. The prosecutors knew full well that it would exonerate Paul and prejudice petitioners who would have no way to confront Paul's accusations. The jury proved this by acquitting Paul.

7. Use of Paul's Transcript Testimony Against Petitioners

The effect of Paul's Grand Jury testimony on the trial jury need not be left to pure conjecture. In a concurring and dissenting opinion in the Superior Court in this case, Judge Woodside analyzed it accurately:

> "... The question here is whether the jury used this testimony to the prejudice of appellants. We start with the presumption that it did not, because the trial judge told it not to. But, as I see it, this is a presumption which circumstances can rebut, and the use of this testimony throughout the proceedings by both the *trial court and the Commonwealth*, overcomes the presumption that *the jury* did not use it against the appellants.
>
> * * * * *
>
> "To emphasize how impossible it was for the jury to follow the court's instruction not to use this testimony, we need only note that the court

> itself in its opinion used over 700 words to review Paul's testimony. . . . Even in the argument before this Court, the District Attorney made extensive use of Paul's grand jury testimony to support the convictions of appellants, particularly Evans. If the judge and the district attorney continue to use Paul's testimony to determine and argue the guilt of the appellants, it is conclusive proof to me that Paul's testimony could not possibly have been ignored by the jury in passing upon the appellants' guilt."
>
> *Commonwealth v. Evans, et al.*, 190 Pa. Superior Ct. 179, at 278.

Judge Woodside was referring in the second paragraph above to events occurring *after Paul's acquittal*, i.e., on Motion for new trial, and on appeal.

And the majority opinion of the Superior Court fell victim to the same temptation. It relied on Paul's testimony to affirm the convictions of petitioners because, as dissenting Judge Watkins in that Court said, ". . . *without this testimony there remains no set of circumstances from which an inference of guilt can arise.*" 190 Pa. Superior Ct. 179, at 309.

8. Reading and Interpretation of Law by Commonwealth Witnesses

The primary function of the judge in a jury trial is to attend to the law of the case, to instruct the jury accurately on the applicable law. Under Pennsylvania cases and probably in all jurisdictions, the judge is to instruct the jury on the law, *Schofield Discipline Case*, 362 Pa. 201, and it is error to permit witnesses to interpret the law, *Commonwealth v. Giltinan*, 64 Pa. 100. Even counsel in Pennsylvania have no right to read law to the jury in argument, it being within the court's

discretion to permit it. *Commonwealth* v. *Rongo*, 216 Pa. 147, 65 A 30, approved this discretion, but criticized the practice. That witnesses are incompetent to testify concerning statutes is the general rule. See *State* v. *Claiborne*, 185 Iowa 170, 170 N.W. 417; *McLendon* v. *Columbia*, 101 S.C. 48, 85 S.E. 234; and *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 2021, 88 S.W. 2d 1007. No cases to the contrary were found.

The departure of the trial court in this case was gravely detrimental to petitioners' chance for a fair trial and their right to have the *correct* law and interpretation presented to the jury by an impartial judge. And it was not a simple departure from the rule. The witnesses were the Deputy Attorney General of Pennsylvania and the Pennsylvania Highway Department Chief Counsel. The first read some statutes applicable to the Turnpike Commission *and interpreted them*. The latter read Highway Department statutes (held inapplicable by the Superior Court in this case) *and interpreted them* and also testified about *Highway Department application of these immaterial statutes*. Petitioners' objections were all overruled, including renewals at the end of the trial.

This procedure deprived petitioners of a fair trial, of due process, and of the equal protection of the laws of Pennsylvania, by depriving them of judicial supervision of their trial, and by causing them to be tried on laws not involved in the case.

9. Compulsory Production of Evidence

The trial court ordered petitioner Stickler to produce certain Mann-Mine business records in front of the jury. After the Commonwealth had discovered that Clyde J. Siegfried, a Commonwealth witness then

on the stand, whom it had subpoenaed for them, did not have them at the time of the subpoena. Outrageously ignoring the Federal and Commonwealth constitutional guarantees against self-incrimination, the trial judge required petitioner Stickler, in full view and hearing of the jury, to comply with the subpoena which had been directed to Siegfried. Similar action was the basis for a new trial in *Commonwealth* v. *Valeroso*, 273 Pa. 213, 116 A 828.

The Superior Court in this case acknowledged that *Valeroso* is the authority in Pennsylvania on this question. But that court attempted to vitiate the force of that case by citing other cases which hold that the "custodian" of corporate records may not withhold them because he might be personally incriminated. That court overlooked the fact that in this case (1) no subpoena to Stickler had issued, (2) that Stickler was a defendant on trial, and (3) that the demand and order was made without notice in front of the jury. This situation differed importantly from the facts in the cases cited by the Superior Court. *Curcio* v. *United States*, 354 U.S. 118, involved a union officer subpoenaed to testify and produce union records before a special grand jury. He refused to testify or to produce the records. His privilege as to testimony was upheld, but this Court ruled he must produce the papers since the Corporation (union) had no privilege. But he was (1) a witness, not a defendant, (2) who had been *subpoenaed duces tecum*, and (3) the demand was not before a trial jury called to decide his guilt or innocence of a crime.

The evil that is complained of here is well described in the Annotation, *Calling upon accused in the pres-*

ence of jury to produce document, etc., 110 A.L.R. 101 at 102, quoting *Commonwealth* v. *Valeroso*, *supra*:

> "If there be a missing link in the Commonwealth's case, what more damning circumstance could there be to the defendant, to whose possession it is alleged to have been traced, than his standing mute under call?"

The annotation continues:

> "For the prosecuting officer, in the presence of the jury, to call upon the accused to produce an original writing, as in his possession, is to place him in a position before the jury where his action will be tantamount to giving, under compulsion, incriminating evidence against himself; for the accused must, in answer to the call, either produce the document or explain its nonproduction, or maintain a silence highly prejudicial to his case. *Com.* v. *Hubbard* (1916) 65 Pa. Super. Ct. 213."

Thus, petitioner Stickler was deprived of his constitutional rights in particular, and his fellow petitioners burdened by yet another cause of general prejudice against them.

10. Admission of Testimony of Crimes and Conspiracies of Others

In *Lisenba* v. *California*, 314 U.S. 219, at 236, a State criminal case, this Court pointed out, "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." The trial against these petitioners produced several violations of this rule, some more direct than others, notably Paul's grand jury testimony. But an equally unfair tactic was employed by the Commonwealth when

it presented five "rebuttal" witnesses, the gist of whose testimony was that they were employees of Manu-Mine and that they had committed crimes entirely distinct from those in this case, and entirely without the knowledge of any defendant. Their evidence was true, but served only to nail the coffin-lid on petitioners' hopes for a fair trial. The Commonwealth prosecutors used these witnesses to bias the jury, hoping that their anger and disgust with these *confessed criminals* would find an outlet against petitioners.

Permitting these witnesses to testify was contrary to the general rule prevailing throughout this Country that evidence of other and distinct offenses are inadmissible in a criminal prosecution. *Faust* v. *United States*, 163 U.S. 452. Such is the rule in Pennsylvania. *Commonwealth* v. *Bardolph*, 326 Pa. 513.

The prosecution asked petitioner Stickler and defense witness Luke, a Manu-Mine engineer, whether they knew of any wrong-doing connected with the supplying of fill for the mine cavities. Both stated *they had no knowledge* of any such crime. Under Pennsylvania law, it is not permitted to attack the credibility of a witness on matters in which his answer amounts to "I don't know." *Commonwealth* v. *Kettering*, 180 Pa. Superior Ct. 247, 119 A 2d 580. Furthermore, the same rule against attacking credibility is applied when the testimony involves collateral matters. *Commonwealth* v. *Petrillo*, 341 Pa. 209, 19 A. 2d 288; *Zubrod* v. *Kuhn*, 357 Pa. 200. In the trial of petitioners the prosecution violated both rules, since the witnesses declared ignorance of facts of a collateral matter.

As in so many other matters already discussed, it becomes clear that the Commonwealth, determined to convict petitioners, used unconscionable means at every

opportunity, that it was not even reluctant to violate its own fundamental evidence rules, which protect all citizens of Pennsylvania, except Petitioners.

11. The Bias of the Trial Judge

The preceding discussion has given some indication that the trial judge was less than impartial in his handling of important evidentiary questions. His rulings reflected his general attitude toward petitioners during the trial.

His attitude was especially unfair toward petitioners' requests for offers of proof. Such requests had to be made because of the number of defendants and charges involved so that it might be made clear what defendants and what charges were involved with particular Commonwealth testimony and evidence, to exclude incompetent and irrelevant testimony, and to eliminate the necessity for numerous defense objections. But the trial judge abused the discretion vested in him and hampered the defense, while toward the prosecution he exhibited the unusual solicitude of requiring, on his own motion, an offer of proof for a defense witness. (5404r-5446r)

The trial judge refused defense requests for offers of proof for these 15 witnesses:

Lawler 567r, 576r, 580r-583r
Summers 810r, 810r-812r
Guldin 1493r
LaManna 1656r, 1658r, 1706r, 1712r-1714r
Connelly 1759r, 1782r
Beaney 1995r
Lambert 2013r, 2129r
Kudlich 2190r, 2202r, 2216r

Pierce 2315r
Corey 2561r
Wallower 2647r, 2566r, 2723r-2725r
Martin 2592r, 2593r
Stuart 2925r
Siegfried 2934r, 2940r-2942r, 3013r
Oswald 3025r, 3034r, 3037r

By his arbitrary refusals, the trial judge deprived petitioners of the usual protections afforded by the Pennsylvania rules of evidence under *McClellan* v. *Lindsay*, 1 WNC 350, 362; *Morgan, et al.* v. *Brown*, 71 Pa. 130, 136; and *Rogers, Adm.* v. *Fleming*, 325 Pa. 228, 233.

The bias of the trial judge appeared also in his treatment of objections by the defense (837r, 2349r, 2356r, 3418r, 3942r, 4455r, 4906r, 5190r), in his discrimination in the scope of defense examination of witnesses (696r, 1178r, 1179r, 3246r-3254r), in his sarcasm (3315r-3316r, 3345r, 3984r, 4424r), and in his charge to the jury (6421r, 6421r, 6435r, 6438r).

These examples of the attitude of the trial judge coupled with his rulings on the various phases of evidence, made it very clear to petitioners that he was aligned with the prosecution against them. Under this circumstance, a fair trial was impossible.

12. Petitioners Were Deprived of a Fair Trial

In *Rochin* v. *California*, 342 U.S. 165 at 169, this Court defined its responsibility in criminal cases before it from the courts of the States.

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an

> exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' *Malinski* v. *New York*, *supra* (324 U.S. at 416, 417)."

Under *Lisenba* v. *California*, 314 U.S. 219, 236, a state is free to choose her own rules of evidence, but this freedom to erect her own structure of justice does not free that structure from the scrutiny of this Court in the area of due process.

Massey v. *Moore*, 348 U.S. 105, 108, states the effect of the Fourteenth Amendment on state criminal trials simply and concisely: "The requirement of the Fourteenth Amendment is for a fair trial." (citing *Betts* v. *Brady*, 316 U.S. 455).

This Fourteenth Amendment requirement has recently been brought directly to bear on Federal prosecutions by this Court's decision in *Elkins* v. *United States*, — U.S. —, 28 L.W. 4567, in which it was held that evidence obtained in violation of the Fourteenth Amendment by State officers is inadmissible in a Federal prosecution. In discussing the issue this Court stated at 4570:

> "If resolution of the issue were to be dictated solely by principles of logic, it is clear what our decision would have to be. For surely no distinction can logically be drawn between evidence obtained in violation of th Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. . . ."

Petitioners here have travelled a long and discouraging road in quest of a fair trial. They must find it here or nowhere. The Commonwealth of Pennsylvania has turned a deaf conscience toward them since its Governor used television to make political hay at the expense of petitioners' rights and freedom.

Petitioners contend that this Court may find a violation of the Fourteenth Amendment to the United States Constitution in any one of the many instances discussed in this petition.

But whether any one error violated the Amendment need not be decided. The "whole course of the proceedings" should be examined under the rule of the *Rochin* case. Such an examination must reveal beyond any doubt that petitioners have not been accorded a "faig trial."

Stated another way: the Questions Presented when taken together do so taint the proceedings in their cumulative effect as to constitute a denial of due process even though, when examined "standing alone", they may not in and of themselves require reversal.

We think this Court has already answered this question and therefore only recall the admonition in *Kotteakos* v. *United States*, 328 U.S 750, 765:[10]

> "If one cannot say with fair assurance after pondering all that happened without stripping the erroneous from the whole, the judgment was not substantially swayed by the error, it is impossible to concede that substantial rights were not effected."

[10] The fact that this is a Federal case does not detract from the efficacy of the admonition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Title 36, Pennsylvania Statutes

Turnpike Act

§ 652d. Turnpike Commission created; powers and duties; salaries

That there is hereby created a commission to be known as the "Pennsylvania Turnpike Commission" and by that name the commission may sue and be sued, plead and be impleaded, contract and be contracted with, and have an official seal. The commission is hereby constituted an instrumentality of the Commonwealth, and the exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth. The commission shall consist of five members, and the Secretary of Highways shall be a member ex officio. The four remaining members shall be appointed by the Governor by and with the advice and consent of two-thirds of the members of the Senate, and shall be residents of the Commonwealth of Pennsylvania at the time of their appointment and qualification, and shall also at such time have been qualified electors therein for a period of at least one year next preceding their appointment. * * * The Commission shall make necessary rules and regulations for its own government and shall have power and authority to acquire, own, use, hire, lease, operate and dispose of personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ engineering, traffic, architectural and construction experts and inspectors and attorneys, and such other employes as may be necessary in its judgment, and fix their compensation: Provided, however, That all contracts and agreements relating to the construction of the turnpike and connecting tunnels and

bridges shall be approved by the Department of Highways, and the turnpike and connecting tunnels and bridges shall be constructed under the supervision of the Department of Highways. * * * 1937, May 21, P.L. 774, No. 211, § 4.

§6602 Construction of turnpike authorized; location; bonds authorized

In order to facilitate vehicular traffic across the Commonwealth and to provide additional traffic facilities to the industrial communities of the northeastern section of the Commonwealth, the Pennsylvania Turnpike Commission heretofore created by virtue of the provisions of the act approved the twenty-first day of May, one thousand nine hundred thirty-seven (Pamphlet Laws 774), and the supplements and amendments thereto, is hereby authorized and empowered to construct, operate and maintain a turnpike at such location as shall be approved by the Governor and the Department of Highways, from a connection with the Pennsylvania Turnpike System, at such point east of the Susquehanna River as the Pennsylvania Turnpike Commission may decide is most feasible and practicable, to a point on or near the boundary line between the Commonwealth of Pennsylvania and the State of New York, between the Susquehanna River at Sayre and the Delaware River, including a central connection extension from a point on the Northeastern Extension westwardly to a point at or near the Susquehanna River and a central connection extension from a point on the Northeastern Extension eastwardly to a point at or near the Delaware River, together with connecting roads, tunnels and bridges; and further, to issue turnpike revenue bonds of the Commonwealth, notes or other obligations, payable solely from revenues of the Commission, including tolls, or from such funds as may be available to the Commission for that purpose, to pay the cost of any and all construction. 1951, Sept. 27, P.L. 1340, §2, as amended 1953, July 28, P.L. 693, §2.

* * * * * * * *

§660.4 Definitions

The following words and terms shall have the following meanings:

(a) The word "Commission," shall mean the Pennsylvania Turnpike Commission heretofore created by the act, approved the twenty-first day of May, one thousand nine hundred and thirty-seven (Pamphlet Laws 774), or if said Commission shall be abolished, any board, commission or officer succeeding to the principal functions thereof or upon whom the power and functions given by this act to said Commission shall be given by law.

(b) The word "owner" shall include all individuals, copartnerships, associations or corporations having any title or interest in any property rights, easements or franchises authorized to be acquired by this act.

(c) The words "the turnpike" shall mean the turnpike to be constructed, as hereinafter provided, from a connection with the Pennsylvania Turnpike System east of the Susquehanna River to a point on or near the boundary line between the Commonwealth of Pennsylvania and the State of New York, between the Susquehanna River at Sayre and the Delaware River, including a central connection extension from a point on the Northeastern Extension westwardly to a point at or near the Susquehanna River and a central connection extension from a point on the Northeastern Extension eastwardly to a point at or near the Delaware River, and may be constructed as a whole at one time or in sections from time to time, as the Commission shall determine, and shall be deemed to include not only the turnpike and all connecting roads, tunnels and bridges connected therewith, but also all property rights, easements and franchises relating thereto and deemed necessary or convenient for the construction or the operation thereof.

(d) The term "cost of the turnpike" shall embrace the cost of constructing the turnpike and all connecting roads,

tunnels and bridges, the cost of all lands, property rights, rights of way, easements and franchises acquired, which are deemed necessary or convenient for such construction, the cost of all machinery and equipment, financing charges, interest prior to and during construction and for one year after completion of construction, cost of traffic estimates and of engineering and legal expenses; plans, specifications, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of the enterprise, administrative and legal expense, and such other expenses as may be necessary or incident to the financing herein authorized, the construction of the turnpike and connecting roads, tunnels and bridges, the placing of the same in operation, and the condemnation of property necessary for such construction and operation. Any obligation or expense contracted for by the Commission with the Department of Highways of the Commonwealth of Pennsylvania, or with the United States or any agency thereof, for traffic surveys, preparation of plans and specifications, supervision of construction, and other engineering, administrative and legal services and expenses in connection with the construction of the turnpike or any of the connecting roads, tunnels and bridges, shall be regarded as a part of the cost of the turnpike, and shall be reimbursed or paid out of the proceeds of the turnpike revenue bonds, notes or other obligations hereinafter authorized. Payment of any notes or other obligations shall be considered payment of the cost of the turnpike provided such notes or other obligations shall be considered payment of the cost of the turnpike provided such notes or other obligations were issued for such purpose. 1951, Sept. 27, P.L. 1340, §4, as amended 1953, July 28, P.L. 693, §3.

§669.5 Essential governmental function

The exercise by the Commission of the powers conferred by this act in the construction, operation and maintenance

of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth. 1951, Sept. 27, P.L. 1430, §5.

§660.6 Powers and duties of Commission

The Commission shall have the following powers and duties:

(a) It shall maintain a principal office at such place as shall be designated by the Commission.

(b) The Commission may contract and be contracted with in its own name.

(c) The Commission may sue and be sued in its own name, plead and be impleaded: Provided, however, That any and all actions at law or in equity against the Commission shall be brought only in the proper courts at the County of Dauphin.

(d) The Commission shall have an official seal.

(e) The Commission shall make necessary rules and regulations for its own government, and shall have power and authority to acquire, own, use, hire, lease, operate, and dispose of, personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ engineering, traffic, architectural and construction experts and inspectors, and attorneys, and such other employes as may in its judgment be necessary, and fix their compensation: Provided, however, That all contracts and agreements relating to the construction of the turnpike and connecting roads, tunnels and bridges shall be approved by the Department of Highways, and the turnpike and connecting roads, tunnels and bridges shall be constructed under the supervision of the Department of Highways.

(f) The turnpike when completed and opened to traffic shall be maintained and repaired by and under the control

of the Commission through the Department of Highways of the Commonwealth, and all charges and costs for such maintenance and repairs actually expended by said Department of Highways shall be paid to it by the Commission, upon certification thereof, out of tolls. Such turnpike shall also be policed and operated by such force of police, tolltakers and other operating employes as the Commission may, in its discretion, employ.

(g) The Commission shall have authority, at its own cost, to provide grade separations with respect to all public roads and State highways intersected by the turnpike and to change and adjust the lines and grades thereof so as to accommodate the same to the design of such grade separation: Provided, however, That the damages incurred in changing and adjusting the lines and grades of such public roads and State highways shall be ascertained and paid by the Commission in the same manner as is provided for by this act in regard to the location and construction of the turnpike.

(h) If the Commission shall find it necessary to provide a grade separation or change the site of any portion of any State highway or public road, or vacate the same, it shall cause it to be reconstructed and restored forthwith, at the Commission's own proper expense, on the most favorable location and in as satisfactory a manner as the original road, or vacate it, as the case may be: Provided, That the method of acquiring the right-of-way and determining damages incurred in changing the location of or vacating such road or State highway shall be ascertained and paid for by the Commission in the same manner as is provided for by this act in regard to the location and construction of the turnpike. In such cases, the plan of such reconstruction and restoration or vacation shall be submitted to the supervisors of the proper township for approval, and in the event of failure of the supervisors to approve the plan, then it shall be submitted to the Department of Highways for final approval. In the case

of State Highways, the plan shall be submitted to the Department of Highways for its approval.

(i) The Commission shall also have authority to petition the court of quarter sessions of the county wherein is situate any public road or part thereof affected by the location therein of the turnpike, for the vacation, relocation or supply of the same, or any part thereof, with the same force and effect as is now given by existing laws to the inhabitants of any township of such county, and the proceedings upon such petition, whether it be for the appointment of viewers or otherwise, shall be the same as provided by existing law for similar proceedings upon such petitions.

(j) The Commission shall otherwise have all of the powers and perform all of the duties prescribed by the act, approved the twenty-first day of May, one thousand nine hundred and thirty-seven (Pamphlet Laws 774), and any supplements or amendments thereto.

(k) Adequate compensation shall be made by the Commission out of funds provided under the authority of this act for damage to all public or private property taken, injured or destroyed in carrying out the powers granted by this act, or such property may be restored or repaired and placed in its original condition as nearly as practicable, as the Commission may deem it expedient in any particular case. (1951, Sept. 27, P.L. 1430, §6.

§660.18 Turnpike to be part of state highway system when obligations paid or payment provided for

When all bonds, notes or other obligations and the interest thereon shall have been paid, or a sufficient amount for the payment of all bonds, notes or other obligations and the interest to maturity thereon shall have been set aside in trust for the benefit of the holders of such bonds, notes or other obligations and shall continue to be held for that purpose, the turnpike and the connecting roads, tunnels and bridges shall become a part of the system of

State highways and shall be maintained by the Department of Highways free of tolls; and thereupon, the Commission shall be dissolved, and all funds of the Commission not required for the payment of the bonds, notes or other obligations, and all machinery, equipment and other property belonging to the Commission, shall be vested in the Department of Highways. 1951, Sept. 27, P.L. 1430, §18.

STATE HIGHWAY ACT

§670—102. Definitions

When used in this act, the following words and phrases shall have the following meanings:

(1) "State highway" shall mean and include all roads and highways taken over by the Commonwealth as State highways under the provisions of any act of Assembly. Unless clearly so intended, the term shall not include any street in any city, borough or incorporated town, even though the same may have been taken over as a State highway.

(2) • • •

(3) • • •

(4) • • •

1945, June 1, P.L. 1242, art. I, §102.

§670—103. Excluded provisions

This act does not include any provisions of, and shall not be construed to repeal:

(1) • • •

(2) • • •

(3) • • •

(4) Any law administered by the Pennsylvania Turnpike Commission;

(5) • • •

(6) • • •

(7) • • •

(8) * * *

(9) * * *.

(10) Any amendment or supplement of any of the laws referred to in this section. 1945, June 1, P.L. 1242, art. I, §103.

* * * * * * *

§670—401. Duty on department of highways

The department shall construct or improve, and thereafter maintain and repair, at the cost and expense of the Commonwealth, the highways forming the plan or system of the State highways, in the several counties and townships. Such improvement and maintenance shall be made according to specifications to be prepared by the department, as regards the character, construction, and material to be used. The work of construction and maintenance of said State highways shall be done under the direction and supervision of the secretary. The secretary, in addition to the powers conferred upon him in this act, shall enjoy and possess, in the construction and maintenance of State highways, all the rights and powers conferred by existing laws on supervisors or commissioners in townships in the construction or maintenance of township roads. 1945, June 1, P.L. 1242, art. IV, §401.

APPENDIX B

Docket Entry

DECISION

The order and judgments of the Superior Court are affirmed on the opinion of President Judge Rhodes, reported at 190 Pa. Superior Ct. 179.

PER CURIAM.

MR. JUSTICE BELL filed a concurring and dissenting opinion in which MR. JUSTICE B. R. JONES joins.

MR. JUSTICE COHEN took no part in the consideration or disposition of this case.

Opinion of the Court

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Nos. 35, 37, 39 and 41 May Term, 1960

No. 35—Appeal of Clayton A. Landsidle
No. 37—Appeal of Charles W. Stickler
No. 39—Appeal of Thomas J. Evans
No. 41—Appeal of James F. Torrance

COMMONWEALTH

v.

THOMAS J. EVANS, JAMES F. TORRANCE, JOHN D. PAUL, THEODORE S. PAUL, CHARLES W. STICKLER, CLAYTON A. LANDSIDLE, PAUL J. McNEILL, G. J. HUDERT, E. J. DONNELLY

Nos. 36 and 38 May Term, 1960

No. 36—Appeal of Clayton A. Landsidle
No. 38—Appeal of Charles W. Stickler

COMMONWEALTH

v.

CHARLES W. STICKLER and CLAYTON A. LANDSIDLE

No. 40 May Term, 1960

COMMONWEALTH

v.

THOMAS J. EVANS, *Appellant*

No. 42 May Term, 1960

COMMONWEALTH

v.

JAMES F. TORRANCE, *Appellant*

Appeals from Order and Judgments of the Superior Court at Numbers 29, 30, 31, 32, 33, 34, 36 and 37 March Term 1959 affirming Judgments of sentence of the Court of Quarter Sessions of Dauphin County dated June 5, 1958.

PER CURIAM. FILED: April 21, 1960

The order and judgments of the Superior Court are affirmed on the opinion of President Judge Rhodes, reported at 190 Pa. Superior Ct. 179.

Mr. Justice Bell filed a concurring and dissenting opinion in which Mr. Justice B. R. Jones joins.

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Nos. 35, 37, 39 and 41 May Term, 1960

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No. 37—Appeal of Charles W. Stickler
No. 39—Appeal of Thomas J. Evans
No. 41—Appeal of James F. Torrance

COMMONWEALTH

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Concurring and Dissenting Opinion

BELL, J. FILED: April 21, 1960

A gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the Northeastern Extension of the Pennsylvania Turnpike, for which a number of people have been convicted and duly sentenced. Evans, a former Chairman of the Commission, and Torrance, a former member and former Secretary-Treasurer of the Commission, were convicted on separate indictments of misbehavior in office and of conspiracy with others to cheat and defraud the Pennsylvania Turnpike Commission. The Superior Court unanimously reversed the conviction of Torrance on the charge of misbehavior in office, reversed the judgment of sentence of one Paul J. McNeill on the indictment charging conspiracy, and by a vote of four to three sustained a conviction of Evans, Torrance and two others on the conspiracy charge.

The crime of conspiracy for which these defendants were convicted "arose principally out of a contract dated February 28, 1955, between the commission and Manu-Mine." *Commonwealth v. Evans, et al.*, 190 Pa. Superior Ct. 179; 195. The purpose of the contract was to provide surface support for the right-of-way of the Northeastern Extension of the Turnpike across the anthracite coal regions by the use of slushing material into mine voids underlying the roadway area, which land had been appropriated by the Commission for part of the Northeast Highway.

The basic questions involved in these appeals are twofold: (1) Was the Commonwealth's evidence legally sufficient to prove beyond a reasonable doubt that *each* of these particular defendants was guilty of criminal conspiracy to perpetrate this fraud; and (2) Did the admission of Paul's testimony constitute reversible error?

The contract of February 28, 1955, made by the Commission and Manu-Mine Company was first negotiated and approved by the Turnpike Commission's engineers. The contract was then approved by the Commission's consulting engineers, then by counsel for the Commission, and finally by 14 other people representing the Commonwealth. All of these men, at least at first blush, appear to be as innocent or guilty as Torrance.

It was the theory of the Commonwealth that the defendants had conspired to defraud the Commission by obtaining this contract, and that the drilling and slushing program recommended by Manu-Mine was in fact 95% unnecessary, and that the price for drilling was unconscionably excessive and fraudulent, especially since Manu-Mine had represented that the contract cost per foot of drilling had been computed on the basis of the cost plus only 10 per cent profit.

The Pennsylvania Turnpike Commission was composed on February 28, 1955 of Evans, Chairman, Torrance,

McSorley (succeeding Chairman) and Lawler (who shortly thereafter became Acting Chairman), and Watson. Manu-Mine Company or its officers and stockholders made a profit from this contract, with the Commission variously estimated at from 4 to 10 million dollars. Evans' term expired June 30, 1955. All of the Commissioners (except Watson who was dead) denied that they had committed any fraud, denied any conspiracy or knowledge thereof, and denied any and all wrong-doing. Of the five Commissioners only Evans and Torrance were accused, or arrested, or indicted for conspiracy and fraud.

Torrance's Appeal

Lawler testified in behalf of the Commonwealth: "Q. Do you mean to tell us that you voted for and did vote for the awarding of the contract and the doing of the work without knowing what was involved? [Lawler had actually visited the scene of the work, and the Secretary of Highways had had a representative of his department assigned to the work, and 14 different people had approved *each* payment received by Manu-Mine.] A. I depended upon the legal counsel, I depended upon our engineering staff, I depended upon our consulting engineers. That is why the Turnpike has retained these people to advise and instruct us Commissioners." This, as Torrance testified, is exactly the explanation of and the reason why he voted for the contract, as did Lawler, McSorley and Watson. Evans and McSorley were successful business men; the other members of the Commission were experienced in politics and had held public office. No one pretends and no one could successfully contend that McSorley and Lawler and Watson were dupes of Torrance.

Lawler gave as his explanation for his approval of the contract not only a proper and justifiable reason, but the only answer that an honest man could give. Public officials must frequently rely upon their deputies and assistants.

These officials cannot be held criminally responsible for the negligence, or even for criminal acts of their deputies and assistants under circumstances such as these. We must never forget that the Commonwealth cannot prove a criminal case by suspicion or conjecture; it must prove it by evidence of facts and circumstances which are of such a nature and quality as to establish the guilt of each defendant beyond a reasonable doubt. *Commonwealth* v. *Klaiber*, 378 Pa. 412, 106 A. 2d 820; *Commonwealth* v. *Sanders*, 390 Pa. 379, 134 A. 2d 890; *Commonwealth* v. *Kravitz*, . Pa. .

The contract was negotiated for the Commission by its engineer Paul. Torrance voted for the contract with Manu-Mine dated February 28, 1955, as did all the other members of the Commission, after it was approved, we repeat, by the Commission's engineers, by the Commission's consulting engineers, by counsel for the Commission, and by 14 other people representing the Commonwealth. There is absolutely no evidence that any of the Commissioners suggested or dictated any of its terms or even saw the proposed contract prior to the hearing at which it was approved.

What did Torrance do that was wrong or criminal? And what did he do that was different from what Lawler, McSorley and Watson did, who were never accused of wrongdoing or indicted for this crime? The only evidence of any substance whatsoever to convict Torrance was:

(1) That Manu-Mine Company and or its officers and stockholders, *with which he had absolutely no connection directly or indirectly*, made a profit of $4 million dollars;

(2) That "On December 21, 1954 Torrance received from Stickler a Christmas gift certificate* which he used on May 5, 1955 to purchase a suit of clothes." Obviously

* One of the engineers who was acquitted received a television set as a Christmas present from Stickler in 1954.

this was not only unethical, but highly reprehensible. However, it doesn't prove, as the Commonwealth argues, that he was a co-conspirator with Evans, Stickler, Landsidle and others to defraud the Turnpike Commission of millions of dollars;

(3) That Torrance, who is a farmer, built a trench silo in an old quarry on his farm at a cost of approximately $500. Stickler saw him at the farm show and asked him to permit him to insert on the silo, *which was then already built and ready for use*, a new type of wall which Manu-Mine hoped to market for silos. Torrance, in the light of hindsight, foolishly accepted this offer; and Torrance invited photographers and newspaper men to his farm to see this wall which had been put up by Manu-Mine. Pictures and information about Torrance's silo wall and that Manu-Mine was the builder were published in National Farm Journals, newspapers and magazines throughout Pennsylvania.

The theory of the Commonwealth was that it could not possibly have been defrauded of 4 to 10 million dollars unless Evans and Torrance conspired with others to enable Manu-Mine or its officers and stockholders to illegally make a colossal fraudulent profit on this engineering project. If Torrance was a conspirator he was an absolutely indispensable *master* party to the conspiracy. If Torrance was going to enable other persons to make millions of dollars out of this contract, isn't it contrary to reason and all human experience that he would do so for a $200. Christmas present and a *publicly* exposed* unnecessary

* What is the distinction, where is the line drawn, between the acts and conduct of public officials and those having a proper legitimate interest in legislation or in matters coming before the public official or public body? What conduct and which acts are proper and which are improper? The Country was startled and shocked by newspaper revelations of large *secret* gifts to public officials during the Truman Administration. The Country was similarly shocked by the revelation of secret loans or gifts to a

outer silo wall? The logical inference to be drawn from Torrance's use of the gift certificate is that he was *not* a member of the conspiracy. If he was even suspicious that a scheme or conspiracy existed to defraud the Commonwealth of millions of dollars, would he, in the light of his age and reputation, have joined the conspiracy *as one of its two indispensable mister crooks*, or even permitted suspicion to be poined at him for the sake of a suit of clothes? Isn't the only reasonable inference which can be drawn from his acceptance of the gift certificate, that he knew nothing of the conspiracy or its fraudulent scheme?

'It is equally unreasonable and illogical to contend that Torrance's acceptance and publicizing of a new type of wall which Manu-Mine hoped to market for silos prove beyond a reasonable doubt that he conspired to swindle and defraud the Commonwealth of 4 to 10 million dollars, not for himself, but for the sole benefit of Manu-Mine, its officers and stockholders, with which he had no connection directly or indirectly. When a person intends or plans to commit a crime, he goes about it *clandestinely and*

'Presidential Assistant during the Eisenhower Administration. There are revelations every week of open and secret entertainment of National and State public officials, of yachting parties and plane trips, of pleas by Senators and Congressmen for television stations for a friendly constituent in their State, of public and private entertainment and television sets and gifts given to members of the legislature of Pennsylvania when it adjourns—by persons or companies having business or legislation with or before such public officials or public bodies. With two exceptions not here relevant, none of these men were charged with crime or arrested or indicted for conspiracy or misdemeanor in office or for any crime. Where is the line between what is proper and improper and what is criminal? Isn't it high time, isn't it imperative in order to protect honest public officials and honest men having business with them that a code of ethics be forthwith adopted so that *everyone* may know—without fear of accusations or suspicions—what are his rights and limitations, what is honest and dishonest, proper and improper, legitimate and criminal?

attempts to hide from the public both his identity and every one of his acts which could be linked to the crime. Certainly he does not publicize to the world, as Torrance did, his silo wall and that it was built by and can be bought from Manu-Mines. Instead of being evidence in behalf of the Commonwealth to prove Torrance guilty of fraud, it is more reasonable and logical to say that it demonstrates that he was *not* a party to the crime. Yet these were the two rocks on which the Commonwealth built its entire case. This was the evidence which the Commonwealth contends is legally sufficient to sustain the conviction *beyond a reasonable doubt* of a 70 year old man who all his life has had an outstanding reputation for honesty.

In the light of prevailing practices in Harrisburg and Washington, some of which I consider reprehensible, but none of which are considered criminal, and especially in view of the trifling amount of these gifts in comparison with the multi-million dollar profits which Torrance allegedly fraudulently enabled Manu-Mine to obtain, will the law allow the Commonwealth to say that it proved beyond a reasonable doubt that one of the two alleged *master* crooks was guilty of this multi-million dollar fraudulent swindle because he took as his share of the 4 million dollar loot a $200 Christmas gift certificate and a publicly advertised unnecessary wall on his $500 silo? How unrealistic, and with all due deference to others, how ridiculous can we be?

In *Commonwealth* v. *Kloiber*, 378 Pa. 412, 106 A. 2d 820, the Court said (pages 426, 427): "... it is clearly settled that a man may be convicted on circumstantial evidence alone, provided his guilt is proved beyond a reasonable doubt: [citing cases] ..." "... The circumstantial evidence in this case [i.e., the facts and circumstances proved in *Commonwealth* v. *Bausewine*, 354 Pa. 35, 46 A. 2d 491] is not such "as reasonably and naturally to

justify an inference of the guilt of the accused, . . . and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt'': [citing cases].' ''

In *Commonwealth* v. *Bausewine*, supra, this Court, in reversing a conviction for bribery and discharging the defendant, said (pages 40-41): ''The testimony adduced by the Commonwealth is weak and inconclusive. . . .

''The burden devolved upon the Commonwealth to overcome the presumption of defendant's innocence and to establish, beyond a reasonable doubt the fact that he had accepted money to influence him as a police officer to act contrary to known rules of honesty and integrity. While the mere fact that the evidence adduced is wholly circumstantial is not fatal to the Commonwealth's case (Commonwealth v. DePetro, 350 Pa. 567, 577, 39 A. 2d 838), yet it must be remembered that guilt must be proved and not conjectured. The reasonable inference of guilt must be based on facts and conditions proved; it cannot rest solely on suspicion or surmise. These do not take the place of testimony. The facts and circumstances proved must, in order to warrant a conviction, be such as to establish the guilt of the defendant, not . . . as being absolutely incompatible with his innocence, but at least beyond a reasonable doubt. The circumstantial evidence in this case is not such 'as reasonably and naturally to justify an inference of the guilt of the accused, . . . and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt': Commonwealth v. Marino, 142 Pa. Superior Ct. 327, 16 A. 2d 314; Commonwealth v. Libonati, 346 Pa. 504, 508, 31 A. 2d 95; Commonwealth v. Holt, 350 Pa. 375, 387.''

In *Commonwealth* v. *Rogozinski*, 387 Pa. 399, 128 A. 2d 28, the Court said (page 402):

"'The requirement of the law is that in order to warrant a conviction the facts and circumstances proved must be of such character as to . . . [prove] the guilt of the accused beyond any reasonable doubt . . . and that doubt is for the jury unless the evidence "be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances".': Commonwealth v. Libonati, 346 Pa. 504, 508, 31 A. 2d 95."

I agree with three Judges of the Superior Court that the Commonwealth's evidence was legally insufficient to prove Torrance guilty beyond a reasonable doubt of the crime of fraudulent conspiracy of which he was convicted. *I am convinced* that the judgment against Torrance should be arrested and he should be discharged!

Evans's Appeal

I turn now to Evans's appeal. The Commonwealth's evidence was more than adequate if believed, as it was by the jury, to convict Evans. However, all the Judges of the Superior Court agreed, and I certainly agree, that a number of trial errors were committed during this trial. The Superior Court, by a vote of 4 to 3, disagreed as to whether the errors were harmless or were so prejudicial as to be reversible errors. I find it necessary to discuss only one of them.*

* Some of the questions in these appeals bothered me, as they obviously bothered the Superior Court. President Judge Rhodes wrote an exhaustive able opinion of 77 pages. Judge Woodside wrote, and able concurring and dissenting opinion, in which he analyzed with more particularity several of the important questions raised by Torrance and Evans. Judge Watkins likewise wrote an able opinion, especially in connection with the baffling problems of flushing and subsidence in the coal regions, with which he is an experienced expert. Judge Watkins also devoted a considerable part of his elaborate 31 page opinion to the reasons for the indictment and conviction of Evans and Torrance, which he charged were solely political. I deem it unnecessary to consider these points.

I believe that realistically and practically an errorless trial would have been impossible, considering the nature and length of this trial, which began June 4 and ended July 25, 1957. The testimony totaled over 5000 pages.

In *Commonwealth* v. *Fuqua*, 330 Pa. 4, 198 A. 99, Chief Justice MAXEY, speaking for a unanimous Court, said (page 18):

"There is seldom any criminal or civil trial of any magnitude or duration into the record of which some irrelevant, incompetent and immaterial testimony does not 'creep' and has been subsequently 'stricken out' and the jury instructed to 'disregard it.' To grant new trials whenever such a thing occurred would mean an interminable and intolerable succession of new trials. There is no standard by which the effect of such formally 'sterilized' testimony on the minds of the jury can be gauged. In theory the law intends that no testimony shall have any but a logical effect on juror's minds; in practice, nearly all testimony has both a logical and a psychological effect in varying ratios. The law intends that no witness's testimony shall make any appeal except to the jurors' reasoning faculties; in actual practice, a witness's testimony sometimes makes more of an appeal to the emotions than to the reason."

It is, I believe, humanly impossible to set up a test or standard which can demonstrate definitely or with mathematical certainty whether a jury was able to eliminate from its mind and decision, certain incompetent evidence, or whether that evidence was of such a nature and character that notwithstanding the instructions or admonitions of the trial Judge, it remained in and influenced and prejudiced their minds. The best definition of a harmless error is that given by Justice (former Chief Justice) Horace STERN, in *Commonwealth* v. *Neill*, 362 Pa. 507, 67 A. 2d 276, where, in discussing the effect of an improper suggestion made by the District Attorney to the effect that

defendant had attempted to commit an act of sexual perversion, the Court said (page 517): ". . . the question itself, irrespective of its form, was highly reprehensible, because there was nothing whatever in the testimony to indicate that any such offense had been committed or attempted. However, the learned trial Judge, in vigorous language, admonished the jury to expunge from their minds what had thus been intimated, and cautioned them to give no credence to it but to exclude it wholly from their consideration. The test in such case is *whether the jury may have been so strongly influenced* by the improper introduction of such an insinuation *that the effect of it on their minds could not likely be dispelled by the court's subsequent instruction to disregard it:* Commonwealth v. Fugmann, 330 Pa. 4, 17-20, 198 A. 99, 106, 107. In the present instance we do not believe that the jury could have been so influenced, for they must immediately have realized that there was no basis for the District Attorney's 'suggestion'. Be this as it may, it is safe to conclude that, in view of the established, even admitted, atrocity of the crime, this incident was not a contributing factor in the determination of the penalty."

The best that any Judge can do is to conscientiously apply this test in each case where the question of harmless or prejudicial and reversible error is raised.

John D. Paul was indicted as one of the conspirators. Paul's testimony before the Grand Jury (which was so lengthy that it covered approximately 300 pages) was admitted in this trial and was read in full to the jury under the theory that it was a confession or a so-called admission against interest and was therefore admissible against him. It was certainly not a confession and it is likewise questionable whether it rose to the height of an admission against interest. Paul was acquitted. The vice of Paul's Grand Jury testimony was two-fold: (1) it contained highly incompetent testimony, hearsay testi-

mony, and his *guesses*, inferences, conjectures and conclusions, and (2) it was *highly prejudicial to Evans*. Paul's testimony was in reality an attempt to incriminate the other defendants, particularly Evans. In order to determine how highly prejudicial to Evans some of Paul's *grossly* incompetent testimony was, I shall quote a few excerpts therefrom:

"Q. Have you given any consideration to the timeliness of August 25th, 1953, and September 1953, in the light of events that have later occurred? A. Frankly, no, as of this minute I had not. Q. Does it seem to you *as of this minute* that there is any significance to attach to those periods of time? A. There might have been. Q. *What might have been*? A. It might have been in somebody's mind; certainly not mine. Q. Well, what might have been in someone's minds that you can think of at this point that *might incite your curiosity*? A. My curiosity now has been developed somewhat by the coincidence, we will call it, of those two dates, insofar as perhaps later activities of Manu-Mine *might have been concerned in somebody's mind*. Q. *What mind are we thinking of* at this moment, sir, that is particularly attractive to your thinking at this moment; what mind would you be attracted to? A. *The only mind* that I would know *that might be at all interested* in Manu-Mine *would be Mr. Evans*, Chairman of the Commission. . . . Q. What would that have possibly entailed if you had given such consideration to those thoughts that would have come through your mind? A. Well, undoubtedly I would have been told that, maybe rather broadly, that it was none of my business, or something like that. Q. In order to convey it to the Grand Jury, we have to do it through what you were thinking. We have to convey it by words, and you have done it very descriptively. Do you think this was a foregone conclusion that Mr. Stickler was going to operate in this field and all you could do was go along with it? A. Well, to what extent Mr. Stickler was received, I think that that was a pretty foregone

conclusion that he would get the job, . . . A. . . . and someone besides Mr. Evans, I believe it was Mr. Torrance, and the question was: 'Don't you think we ought to do something about the Department of Mines on this case? Q. Who made that statement, sir? A. I believe it was Mr. Torrance. . . . Q. What was Mr. Evans' reaction to Mr. Torrance's inquiry? A. 'No, we don't want that.' . . . Q. Mr. Evans did not want the Department of Mines in this matter, did he? A. No. Q. That was pretty definitely understood by you, was it? A. *I had that impression.* . . . Q. *Why did you conclude* that Mr. Evans didn't want the Department of Mines involved in this? A. Well, actually I don't think I examined *his motive* for thinking so at the time. Q. *Have you since that time examined it?* A. Oh, I thought about it a great deal in the past six or eight months. Q. *What has been the conclusion that your thinking has resolved itself into*, sir? A. Simply this: That the Department of Mines presumably has in its possession or in its record a full supply of maps of all mining work; and that information should be available alone. Now, the question of whether to employ Department of Mines personnel, whether that could be done or not, is quite another story, or was in my mind then. Since then it has, of course, been done, and we employed—I mean the Commission paid for their assisting personnel. So that it no doubt would have been just as possible earlier as it was later. Q. Let's give it a little more validity, sir, to the conclusion, I believe. Isn't this a fact: If the Department of Mines had been consulted it would have done just what it has already done and there wouldn't be any Manu-Mine contract? A. I believe that is a fair statement. Q. In other words, Manu-Mine couldn't have gone into a contract that more than $10 million had been paid on if the Department of Mines had been consulted, *isn't that a fair conclusion?*. A. *I think so.* Q. So, therefore; Mr. Evans, didn't want the Department of Mines involved in this matter, did he? A. That was clear enough to me. Q. So

if the Department of Mines had been involved, Mr. Evans' nephew would not have been involved, is that right? A. I think that is true too. . . . Q. We want to know why, sir. Do you have a reason to ascribe for that? A. The only reason I can ascribe to that is that Mr. Evans might have thought that I would get the contract set up perhaps sooner than Mr. Stone, or something like that; *maybe he had a special purpose in the back of his mind at the time.* Q. *What could that have been?* A. Well, probably another purpose which could have been in the back of his mind was that I was the man who would, say, be duped, put it that way, or, at least, carry out his order to his satisfaction. Q. In other words, or have you now concluded that Mr. Evans did think that he might more easily have you handle the contract of February 28, 1955, than Mr. Roger Stone? A. I would conclude that, yes, sir. Q. There is a reason, isn't there, sir, for most every bit of human conduct? A. Correct. Q. You have ascribed that as a reason, and you have had an opportunity to reflect on it, have you not, sir? A. Yes, sir. Q. That is your considered opinion this afternoon, isn't it? A. Yes, sir, I think so. . . . Q. Did you conclude at that time that Mr. Evans did not want any other drillers in there because there would have been a competitive bidding on that amount of work which would have contrasted to the $12.50 per foot that Manu-Mine was making? A. *At this juncture I would say yes.* Q. Isn't that the reason why no further drillers were brought into that area? Didn't Mr. Evans make it pretty clear to you if any other driller was brought in there there might be a question concerning the $12.50 per foot? A. I would gather that much very clearly, that if anything like competitive bidding was accomplished that that figure might be reduced. That is my opinion; yes, sir. Q. Therefore, you would conclude from that that Mr. Evans gave the instruction to go ahead and drill, and drill regardless of the cost, isn't that right? A. Yes, sir. . . . Q. Other than that, you felt the influence that Mr.

Evans exerted was a primary motive behind this contract for renegotiation? A. Yes, there is no doubt about that. Q. And from decision by Mr. Evans you had no redress? Did he have other Commissioners under his thumb, in your opinion, as he had the department heads? A. Mr. Evans as I have said dominated the Commission. He got what he wanted and that refers to the other members of the Commission as well by one method or another. Somehow whatever he wanted to do the Commission agreed to do."

Some of the questions propounded to Paul by the District Attorney were so outrageous that it is astonishing that such an able lawyer would ask a witness for his guesses, inferences, conjectures and conclusions, especially in the light of hindsight. Although the Commonwealth contends otherwise, it is clear and undisputable (see infra) that it placed great reliance upon this testimony of Paul to forge a necessary link in the conviction of Torrance and particularly Evans.

The trial Judge wisely and fairly told the jury that this testimony was admissible only against Paul, and should not be considered against the other defendants.

I have noted the great lengths to which this Court, and particularly the Supreme Court of the United States, goes to protect the basic rights of defendants to a fair trial in accordance with our Constitution, even though the defendants are hardened, dangerous criminals with a long prior record of felony convictions. It seems to me that at least the same concern should be exercised and the same protection should be afforded to men who have up to now enjoyed splendid reputations in this Commonwealth, as is given to hardened criminals. On the basis of these decisions the admission of Paul's Grand Jury testimony—which contains so much that was outrageously incompetent and so much that was highly prejudicial to Evans—constituted incurable reversible error.

Moreover, the difficulty of actually separating it is strikingly apparent from the recent "split-verdict" Act of December 1, 1959, P.L. . Even more importantly, the difficulty of separating and dispelling *these incriminatory terribly damaging guesses and inferences and conclusions against Evans* is aptly expressed and pinpointed by the exceedingly able concurring and dissenting opinion of Judge WOODSIDE: "To emphasize how impossible it was for the jury to follow the Court's instruction not to use this [Paul's] testimony, we need only note that the court itself in its opinion used over 700 words to review Paul's testimony while stating the facts upon which it relied to sustain the conviction of the appellants. Even in the argument before this Court, the District Attorney made extensive use of Paul's Grand Jury testimony to support the conviction of the appellants, particularly Evans. If the judge and the district attorney continue to use Paul's testimony to determine and argue the guilt of the appellants, it is conclusive proof to me that Paul's testimony could not possibly have been ignored by the jury in passing upon the appellants' guilt.

"The evil of the use of this testimony against the appellants is that (1) they had no opportunity to cross-examine their accuser; (2) they had no opportunity to contradict in rebuttal what was said about them; (3) *they had no opportunity to object to and prevent the use of hearsay and other incompetent testimony* given by Paul to the grand jury. *The unfairness of this is so glaring and so basic that it requires the granting of a new trial.* At a new trial, Paul could be called as a Commonwealth witness and could testify to the *facts* contained in his testimony before the grand jury *so far as they are relevant* to the appellants' cases. The defendants would then have the right to cross-examine him and to rebut any untruthful testimony and to have the trial judge limit the testimony to that which is competent. This would give the appellants the fair trial to which they are entitled, and enable the

Commonwealth to obtain the conviction of those whom the evidence would show to be guilty."

I wholeheartedly agree with the above statement by Judge Woodside. While it is very unfortunate that a case of this magnitude has to be retried, in my judgment, the safeguarding of the law and the preservation of the Constitutional guarantees of liberty and due process are paramount, and Justice demands that a new trial be granted Evans.

I would therefore reverse the judgment and sentence against Evans and direct, in his case, a new trial.

Paul's references to Stickler and Landsidle were very different in kind and degree from his incriminating and glaringly incompetent references to Evans and constituted, at most, harmless errors. I concur in the Court's opinion with respect to the appeals of Stickler and of Landsidle.

Mr. Justice Benjamin R. Jones joins in this Concurring and Dissenting Opinion.

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OCT 11 1960
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term, 1960

No. 418

THOMAS J. EVANS, JAMES F. TORRANCE, CHARLES W. STICKLER and CLAYTON A. LANDSDELL,

Petitioners

v.

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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STATEMENT OF THE CASE

I.

THE PROCEEDINGS BELOW

Petitioners were convicted by a jury in the Court of Quarter Sessions of Dauphin County, Pennsylvania, for offenses involving conspiracy, false pretenses, and misbehavior in office. It was a joint trial. The several indictments were consolidated for trial purposes since the charges were similar, related and connected, all arising out of a multi-million dollar fraud against the Pennsylvania Turnpike Commission, an instrumentality of the Commonwealth of Pennsylvania. This fraud was carried out by means of a contract between the Commission and Manu Mine Research and Development Co. (Manu-Mine), a corporation owned and controlled by relatives of the then chairman of the Commission. The nature of the fraud will be described below. There was a total of nine defendants. The jury convicted five and acquitted four. One of those convicted was discharged on appeal by the Superior Court of Pennsylvania. Petitioners Evans and Torrance were, respectively, chairman and secretary-treasurer of the Pennsylvania Turnpike Commission, and petitioners Stickler and Landsidle were, respectively, president and general manager of Manu-Mine.

All of the defendants had individual counsel. At the very outset of the trial, the court permitted various coun-

sel to withdraw their appearance for defendants whom they had theretofore represented, and to enter their appearance for other defendants, thus giving all of the defendants and their counsel a tactical advantage in the examination of witnesses and enabling them to secure nine separate opening addresses, cross-examinations and summations to the jury. Moreover, the court permitted defense counsel to cross-examine co-defendants and their witnesses who took the stand and to ask them leading questions, thus, in effect, introducing substantial portions of the defense of their respective clients, some of whom did not take the witness stand.

The trial was one of the longest, if not the longest, criminal jury trial in the history of the Commonwealth. It began on June 4, 1957, and ended on July 24, 1957. It consumed thirty-eight trial days. Following the jury verdict, Motions for a New Trial and Arrest of Judgment were filed. Extensive briefs and oral arguments were made before the Dauphin County Court en banc. The jury verdicts were unanimously upheld by that court, consisting of four judges, in an opinion written by The Honorable Homer L. Kreider, Judge. *Commonwealth v. Evans et al.*, 72 Dauph. 31 (1958).

On appeal to the Superior Court of Pennsylvania, the convictions against the four petitioners were upheld. One count against the Petitioner Torrance was reversed on the misbehavior charge. The petitioners filed separate briefs in that court and made separate oral arguments lasting most of two days. The Superior Court, in an opinion written by President Judge Rhodes, *Commonwealth v. Evans et al.*, 190 Pa. Superior Ct. 179 (1959), upheld the convictions with the exception heretofore noted.

The Proceedings Below

A limited allocatur was granted by the Supreme Court of Pennsylvania. Briefs were filed and oral arguments were made by counsel for each of the defendants. The Supreme Court, in a per curiam opinion filed April 21, 1960, affirmed the Order and Judgments of the Superior Court on the opinion of President Judge Rhodes. *Commonwealth v. Evans et al.*, 399 Pa. 387, 160 A. 2d 407 (1960), Justices Bell and Benjamin R. Jones concurring and dissenting in part. Justices Bell and Jones concurred in the majority opinion with respect to the appeals of Stickler and Landsidle. Justice Bell, in the first sentence of his concurring and dissenting opinion, stated, "A gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the Northeastern Extension of the Pennsylvania Turnpike, for which a number of people have been convicted and duly sentenced." (Petitioners' Paper Book App., p. 12a).

II.

HISTORY AND FACTS OF THE CASE

On September 9, 1956, the Attorney General of the Commonwealth of Pennsylvania filed a petition to the Dauphin County Court charging that organized systems of crime involving the officials and employes of the Pennsylvania Turnpike Commission existed within the Commonwealth, and requesting that the court convene an investigatory grand jury which would inquire into these and allied matters. On October 22, 1956, the court convened the investigatory grand jury, which proceeded to subpoena witnesses, books, documents and other evidence, heard and saw witnesses for several months and, on January 18, 1957, handed up a presentment naming a number of individuals, including petitioners, as having violated the criminal law of this Commonwealth, and recommended their indictment to the court. The violation arose out of a contract dated February 28, 1955 between Mann-Mine and the Commission for designing, performing and supervising a program of drilling on a section of the northeastern extension of the turnpike, to provide subsurface support. It was charged that under this contract Mann-Mine obtained $7,000,000.00 from the Commission by fraud and false pretenses, in conspiracy with certain turnpike officials and others. On January 23, 1957, the regular indicting grand jury of the County of Dauphin, after hearing evidence, returned indictments against the defendants.

History and Facts of the Case

At trial the Commonwealth proved the following facts. Manu-Mine, a Pennsylvania corporation, was organized in March of 1951. By 1953, its president and controlling stockholder was petitioner Stickler, a nephew of Mrs. Thomas J. Evans, whose husband, petitioner Evans, was and had been Chairman of the Pennsylvania Turnpike Commission for 16 years. Its other stockholders were Stickler's wife, and Richard Evans, son of Chairman Evans. These three stockholders were also the officers and directors of the corporation. Manu-Mine received its initial turnpike work in 1952, and from that time on until February 1956, more than *90%* of its receipts came from the Turnpike Commission. Manu-Mine was not required to competitively bid for *any* of its work with the Commission. The Manu-Mine stock was worth $100.00 per share at the time of its organization, but by October, 1955, largely as the result of its numerous turnpike contracts, its stock had increased in value to more than $12,500.00 per share (2953r). The most lucrative turnpike contract received by Manu-Mine was that dated February 28, 1955, which was the subject of petitioners' convictions.

This contract of February 28, 1955 came about in the following manner. In October of 1953, Manu-Mine was selected by the Commission to advise the Commission in designating the route of the northeastern extension of the turnpike where it traversed the coal measures. The route recommended by Manu-Mine was accepted by the Commission and land condemnation followed. On July 7, 1954, Manu-Mine was retained by the Commission to do exploratory drilling on the route which it had selected in order to give the Commission engineering advice on the need for subsurface support (5138r). Originally the con-

tract was to be for a *three-month period*, but at the urging of Manu-Mine, it was extended from time to time to cover *fifteen months* (2609r). Under this contract, Manu-Mine was paid $272,250.00 for *engineering* services and $104,712.60 for drilling (2609r). It was *not* bid (5201r).

Greiner & Company, the consulting engineers for the Commission, in their civil engineering report on the northeastern extension submitted in March of 1954 to the Commission, had indicated that there would be little difficulty and only minor expense involved in correcting any subsurface support problem, estimating a figure of $150,000.00 for the purchase of coal in place. In fact, in the construction budget there was *no* allocation of funds for subsurface support (5346r). As a result, however, of competitive bidding among contractors for primary excavation work on the northeastern extension, *an unanticipated $20,000,000.00 surplus arose* (4626r). Chairman Evans now concerned himself with what might be done with the $20,000,000.00, being advised by one of the investment bankers, Steel, who testified for the defense, that it would have to be spent on the northeastern extension (4625r, 4634r, 4635r).

Thereupon, at the close of 1954, *before* it had concluded its work on the exploratory drilling and engineering contract, which was to be the basis for advising the Commission on the need for subsurface support, Manu-Mine, through Stickler and Landsidle, began negotiating with the Commission's Construction Engineer, John D. Paul, for a contract to drill holes on that section of the northeastern extension traversing the coal measures. The holes were to be used for slushing silt and sand into voids purportedly existing beneath the surface.

While these negotiations were still going on, and before any contract had been awarded by the Commission, it became apparent in January 1955 that Manu-Mine had already been picked by Evans for the job, the need for which had not been established, and which, as will appear, was almost entirely unnecessary and made work (3295r, 4209r).

In November 1954, Manu-Mine had submitted a cost analysis of its drilling under its exploratory engineering contract of July 7, 1954, fixing the $14.00 per foot price for drilling on the basis of an *actual drilling rate of 35 feet per shift, and a profit of 10%*. Manu-Mine itself then drafted the contract for the actual drilling and slushing to be done for subsurface support, as distinct from the contract for exploratory drilling, which was supposed to determine if any program was necessary. On January 6, 1955, Manu-Mine, through Landsidle, submitted to Commission Engineer Paul a similar analysis for drilling to be done under the new contract, for which the price was to be $12.50 per foot (4802r). This analysis also represented that it was based *on a 10% profit, and the drilling rate was represented as 28 feet per shift instead of 25 feet*, resulting in the difference between $14.00 and $12.50 (4912r, 4936r). It was also based on use of a No. 32 drill manufactured by the Joy Manufacturing Company.

On February 28, 1955, this contract was approved at a meeting of the Commission and executed by Evans and Torrance for the Commission. There had been *no competitive bidding* on the contract (4507r). This was one of the first meetings of the Commission attended by Lawler, who had begun to serve as Secretary of Highways in January, and who was thereby an ex-officio member of

the Commission. Lawler relied on the assurances of Evans and Torrance that Manu-Mine was a company with an international reputation in the field, and the only company qualified to do the work covered by the contract. Actually, it had no such reputation and no such qualifications, and the representations were false.

Although Lawler voted in favor of the contract as an ex-officio member of the Commission, the contract was not thereafter submitted to the Department of Highways for study and approval, contrary to invariable custom and practice of the Commission for all such construction contracts (527r).

The contract which Manu-Mine drafted and the Commission adopted in the manner described, contained no specifications defining how the work was to be done. It provided for *no performance bond*. It placed Manu-Mine in the triple role of acting as engineer to the Commission and designer of the work to be done, contractor for the performance of the work, and inspector on the same job. It placed *no limitation on the number of feet to be drilled*. It contained no provision for renegotiation. It contained no provision for partial retention of funds due, to secure performance. It contained *no time limit for the performance of the job*, but in all respects was a completely open end contract, under which the Commission was in the position of relying on Manu-Mine's own advice as project engineer on what was necessary to be done (2323r, 2324r and 2352r).

Manu-Mine's original contract estimate for the entire job of drilling and slushing, as submitted in January 1955, called for a total expenditure of four and a half million dollars. As the actual job progressed, Manu-Mine sub-

mitted higher and higher estimates, reaching a peak of nineteen and a half million dollars, by steps, first to nine million dollars, then to thirteen and a half million dollars and then to the limit (5473r). Under the contract and prior to its suspension, Manu-Mine itself, for drilling and supervision, actually received $6,724,719.00 and for the slushing the Commission paid $2,451,030.37. *This resulted in a profit to Manu-Mine, not of the 10% which it had represented, but of 100%.*

The 10% profit, which Manu-Mine presented as the basis for the contract price, was predicated on a drilling rate of 28 feet per shift. The actual experience in the very first month of drilling showed that the rate was *179 feet per shift* (2334r). Stickler and Landsidle actually knew before executing this contract that the drilling rate would be much higher than 28 feet per shift, because they were going to use and did use a much faster drill than they represented in their cost analysis to the Commission, namely the so-called BH 58 drill, instead of the No. 32. This change in the drill to be used was not disclosed to the Commission, nor was the cost analysis ever revised to reflect it (4946r). *While the roadway cost itself amounted to a million dollars per mile, the subsurface support program dictated and performed by the Manu-Mine Company cost the Turnpike Commission in excess of $3,000,000.00 per mile* (2356r).

Ninety to ninety-five per cent of the drilling and slushing performed under the program designed, carried out and supervised by Manu-Mine was unnecessary and of no use in providing additional subsurface support (2112r). The contract price of $12.50 per foot for drilling was exorbitant and should have been at the most between $4.50 and about $5.50 a foot (1970r). Manu-Mine itself,

when required to bid competitively on a job for the Department of Mines of the Commonwealth, where Evans had no influence, in March of 1955, submitted a bid of $3.19 per foot for a substantially similar drilling job at Carbondale, and this bid was rejected in favor of a lower bid (2032r). On this basis of what work was actually necessary and what would have been a proper competitive price, Manu-Mine, instead of receiving almost $7,000,000.00 as it did, would have received no more than $300,000.00.

There was also introduced, but *against himself alone*, the grand jury testimony of the Commission's construction engineer, John D. Paul, which was read into the record by the court reporter who took the notes of testimony in the investigating grand jury. The trial jury was cautioned on *seven* separate occasions that this testimony was admissible against John Paul *alone* (2658r, 6379r, 6431r, 6435r, 6446r, 6474r, and 6475r).

On this contract, Manu-Mine's own controller, Siegfried, testified that *Manu-Mine's operating profit for the work for which it actually billed the Commission was* $5,148,120.12 *on a total billing of* $7,679,441.64 (2961r). He applied an overhead figure of 45% to arrive at the net profit, including in that factor over $200,000.00 paid in bonuses to employes and over $70,000.00 paid for advertising (2982r). Even with these reductions, *Manu-Mine's profit on the contract was* 100% *instead of the* 10% *represented* (2976r). Stickler charged to the cost of sales under this contract a trip to Hawaii for himself and his family, his wife's fur coat, the furniture in their house, a gift certificate to petitioner Torrance, secretary-treasurer of the Commission, and gift of a television set to the Commission's engineer Paul in December 1954 (2983r, 4582r). Manu-Mine also did free work for Torrance on his farm.

REASONS FOR DENYING THE WRIT

It is the position of the Respondent, that the Petitioners were not denied due process and equal protection of the laws under the federal constitution in their trials by the Commonwealth of Pennsylvania. The evidence was clearly sufficient to sustain all of the convictions and its sufficiency is not challenged here. The record shows that petitioners conspired to defraud the Pennsylvania Turnpike Commission of over $7,000,000.00 by the award of a contract for subsurface support, which was *ninety to ninety-five percent unnecessary*, to a company controlled by relatives of the Commission's chairman, at a fantastic price and in complete disregard of all safeguards normally provided in a public contract.

Petitioners had a fair trial, carefully reviewed by two appellate Courts of Pennsylvania. As petitioners themselves recognize: "It is a well-known and honored principle of this Court that in reviewing cases from the courts of the states, it does not invade a state's sovereignty by prescribing the procedures that states must use to afford due process to its citizens," and ". . . petitioners here are not attacking the processes of justice of the Commonwealth of Pennsylvania." (Pet. for Cert., p. 26.) Moreover, ". . . it has long been recognized as 'the very essence of our federalism that the states should have the widest latitude in the administration of their own system of criminal justice.'" *Hoag v. New Jersey*, 356 U.S. 464, 465 (1958).

The eleven alleged errors relied on by petitioners, viewed in the light of these principles and of the entire

record, raise no substantial federal constitutional question. They will now be considered in the order raised.

1. The alleged inflammatory speech of the Governor was made on October 22, 1956. The trial began on June 4, 1957, or approximately eight months later. No further continuance was asked. Although the remarks of the Governor were said to have been widely disseminated in Dauphin County by press, television and radio, the effect of these remarks upon the trial jury has not been raised with particularity by the usual methods, such as a motion for change of venue, a challenge to the array, or by individual challenges for cause during selection of the petit jurors on voir dire. *Commonwealth v. Evans et al.*, 190 Pa. Superior Ct. 179, 267 (1959). The defense offered no evidence to show that the trial jury formed "a fixed, biased and hostile opinion toward the defendant so that they could not fairly weigh in his behalf, such circumstances of doubt, extenuation or degree of guilt that may be present in the case, and thus make them unable to render a true verdict." *Commonwealth v. Meyers*, 290 Pa. 573, 581 (1927); *Commonwealth v. Dixon*, 179 Pa. Superior Ct. 1, 6 (1955).

The jury reached its conclusion without bias or prejudice, on overwhelming evidence.

This Court has held that even where newspapers, radio and television stations carried statements by public officials to the effect that they felt that the defendant was guilty and, further, where the officials even furnished the press, radio and television stations with copies of the alleged confession of the defendant, and such copies were disseminated to the public, the defendant was not denied due process under the Fourteenth Amendment. *California v. Stroble*, 343 U.S. 181, 192, 193 (1952). See *Levi-*

ton et al. v. United States, 193 F. 2d 848 (2d cir.), cert. denied, 343 U.S. 946 (memorandum of Mr. Justice Frankfurter) (1952). If petitioners were sustained on this point, the alarming result would be that they would be forever discharged and major crimes go unpunished, because of remarks made by a public official, months before the trial.

2. Petitioners complain that the indictments stated that certain "legal" requirements, i.e., competitive bidding, retention of fixed percentages, performance bond, negotiation clause, were omitted from the contract. Assuming, arguendo, that this is erroneous, it would be surplusage; the validity of the indictments is not affected by the elimination of the word "legal" or "legally." Eliminating the words "legal" or "legally," the indictments still charge that, in negotiating and obtaining the Manu-Mine contract, the defendants did not comply with the usual practice of the Commission regarding competitive bidding or include other contractual provisions normal to construction contracts, and that the failure to follow these usual procedures was one of the methods by which the fraud was perpetrated, the contract obtained, and the moneys paid, to the prejudice of the Commission. *Commonwealth v. Evans et al.*, 190 Pa. Superior Ct. 179, 200, 201 (1959). Petitioners were clearly apprised by the indictments of the charges against them, and were tried on those charges, not on any others.

3. It is alleged that the District Attorney and the Special Deputy Attorney General intruded upon the deliberations of the special investigating grand jury. This allegation is without merit and, in any event, of no significance, because *no* such allegation is made with respect to the *indicting grand jury*.

The special investigating grand jury minutes reveal that the foreman of the grand jury requested the presence of the District Attorney and the Special Deputy Attorney General for advice. "It is the duty of the District Attorney * * * to attend upon a Grand Jury, lay before them all matters upon which they are to pass, aid them in the examination of witnesses, and give general instructions as may be required." *Commonwealth v. Brownmiller*, 141 Pa. Superior Ct. 107, 113 (1940). Of this incident, Judge Neely said, "We think that the minutes of January 16 reveal no irregularity in the proceedings of the investigatory grand jury." *Commonwealth v. Evans et al.*, 70 Dauph. 197, 202 (1957), citing *Commonwealth v. Brownmiller et al.*, 137 Pa. Superior Ct. 261, 267 (1939). And, as noted above, no irregularity is alleged to have occurred before the *indicting grand jury*, so that trial of the charges on the merits was completely justified. See *Costello v. United States*, 350 U.S. 359, 363 (1956).

4. The motions to quash the indictments and subsequent motions for bills of particulars were denied and appeals were taken to the Superior Court of Pennsylvania. The appeals were held to be interlocutory and the same questions were presented upon final argument before the Superior Court. The refusal to quash was properly sustained for the reasons set forth in the foregoing paragraphs. Refusal of a bill of particulars was clearly discretionary.

5. The petitioners complain that they were prejudiced because the indictments were consolidated and the defendants tried together. The charges of conspiracy, false pretenses and misbehavior in office were all related, arising out of the same factual background.

In such circumstances, the granting of a severance is, under Pennsylvania law, within the discretion of the trial judge. *Commonwealth v. Novak*, 165 Pa. Superior Ct. 576 (1949), cert. denied, 339 U. S. 924. The trial judge, in refusing a severance, did not abuse his discretion. Rather, he followed established precedents in both the state and federal courts in like situations. See *Commonwealth v. Sanderson et al.*, 40 Pa. Superior Ct. 416 (1909), and related cases, aff'd. 227 Pa. 347 (1910); *Commonwealth v. Berman*, 149 Pa. Superior Ct. 315 (1955); *Commonwealth v. Kirk and Skok*, 144 Pa. Superior Ct. 423 (1940), aff'd. 340 Pa. 346 (1941). See also *Opper v. U. S.*, 348 U.S. 84 (1954), and *Caprada v. U. S.*, 61 F. 2d 5 (7th cir. 1932), cert. denied, 287 U.S. 671.

In *Schatter v. United States*, 362 U.S. 511 (1960), the Court, speaking through Mr. Justice Clark, held there was no impropriety in a joint trial "if they (defendants) are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

6 and 7. These allegations will be answered jointly since they involve the reading to the trial jury of the transcript of testimony of a co-defendant, Paul, which was given before the investigating grand jury. This testimony was offered, because it contained "admissions" against Paul and to a *large degree* furnished the basis for the Commonwealth's charge of a conspiracy against Paul.

(a) *In the reading of Paul's testimony, all necessary safeguards were scrupulously observed.*

The reading of John D. Paul's testimony began on June 27, 1956. It consisted of 184 pages of transcript.

The reading was done by Robert Wallower, one of the official court reporters of Dauphin County. Paul's attorney was given a copy of the transcript before the reading began. The trial consumed more than 6,000 pages, and Paul's testimony was introduced at nearly the end of the Commonwealth's case in chief, a point about half way in the record, nearly half way through the trial. The trial Judge admonished the jury *before* it was read, while it was being read and *afterwards* that it was admitted against John D. Paul *alone*, and not against any other defendant (2658r, 6379r, 6431r, 6435r, 6446r, 6474r and 6475r).

(b) *The reading of Paul's testimony is sustained by the overwhelming weight of authority, both federal and state.*

In *Paoli v. United States*, 352 U.S. 232 (1957), this Court upheld the admission against a co-defendant in a *federal trial* of a confession made after the termination of the conspiracy, even though the confession plainly implicated defendant, Paoli, against whom it was not admissible. The Court held that the trial Court's instructions to the jury limiting the effect of the confession were sufficiently clear, that it was reasonably possible for the jury to follow them, and that deletion from the confession of references to Paoli would have been impractical.

Judge Kreider, presiding at the trial in the present case, followed the requirements of Paoli to the letter, scrupulously admonishing the jury on many distinct occasions that Paul's testimony was admissible against him alone.

Here, as in *Paoli*, the separate interests of each defendant were emphasized throughout the trial. Each was

represented by his own attorney, who made a separate opening address, conducted a separate cross-examination and made a separate closing argument to the jury. In fact, defendant Evans had for himself a different attorney on each indictment, so that a total of three appeared for him.

Here, as in *Paoli*, Paul's confession was largely cumulative, since there was *already ample evidence* in the record to sustain the conviction of all defendants. Here, also, as in *Paoli*, the introduction of Paul's testimony, under the court's clearly limiting instructions, was postponed until the Commonwealth was preparing to close its case.

Here, as in *Paoli*, there is nothing in the record indicating that the jury was confused or that it failed to follow the court's instructions. On the contrary, the jury intelligently discriminated among the defendants, and after due deliberation convicted five and acquitted four.

Although the conspiracy here was much vaster in scope than that in *Paoli*, the part of each defendant was just as easily intelligible and clearly defined, and defendants were given full range in presenting their defenses. In fact, when defendants or their witnesses took the stand, other defense counsel, under the guise of "cross-examination" of such co-defendants or their witnesses, succeeded in putting in much of their defense, over the Commonwealth's objection. (See e.g. cross-examination by other defendants' counsel of defendants Torrance, Stickler and Landsidle.) See Judge Kreider's opinion in *Commonwealth v. Evans et al.*, 72 Dauph. 31, 111 (1958).

In an earlier case, *United States v. Gottfried*, 165 F. 2d 360, 367 (2nd cir. 1948), cert. denied, 333 U. S. 860,

Judge Learned Hand, speaking for the majority on the same subject, said:

> "The propriety of admitting a confession or an admission of one of the accused upon a trial of him and others has come up again and again; and, if the customary caution is given that it must be considered only against the declarant (here that caution was several times repeated), the courts have nearly always held that its reception is not erroneous against the others. Nobody can indeed fail to doubt whether the caution is effective or whether usually the practical result is not to let in hearsay. However, hearsay is admissible in all sorts of situations when the truth is not otherwise available, and the fact that this may be another exception is not conclusive against it. As we said in Nash v. United States, supra: 'In effect . . . the rule probably furthers, rather than impedes the search for truth, and this perhaps excuses the device which satisfies form while it violates substance.' In Anderson v. United States, the confession had itself been unlawfully obtained and was incompetent against the declarant; for that reason its admission resulted in a mistrial of the other accused. Hale v. United States was a prosecution for murder, and United States v. Haupt was for treason; both are capital offenses for which the law has always had especial solicitude; and both are atypical."

See also *United States v. Griffin*, 176 F 2d 727 (3rd cir. 1949).

The courts of this Commonwealth have followed the rule sustained by this Court in the *Pauli* case, that declarations by a co-conspirator, after the termination of the

conspiracy, are admissible in evidence in a joint trial, against the person making the declaration, under appropriate instructions to the jury from the trial judge. *See Commonwealth v. Sanderson et al.*, 40 Pa. Superior Ct. 416 (1909); *Commonwealth v. Snader*, 40 Pa. Superior Ct. 485 (1909); *Commonwealth v. Mathues*, 40 Pa. Superior Ct. 546 (1909) and *Commonwealth v. Shaffner*, 40 Pa. Superior Ct. 547 (1909) (involving a joint trial for conspiracy to defraud the Commonwealth).

Similarly, in other jurisdictions, non-confessing defendants' rights are considered properly safeguarded by the trial judge's admonition to the jury. *People v. Miller*, 129 Cal. App. 2d 365, 276 P. 2d 846, 848 (1954); *State v. Fox*, 133 Ohio St. 154, 12 N.E. 2d 413 (1938); *Commonwealth v. Millen*, 289 Mass. 441, 194 N.E. 463, 484 (1935). And see *People v. Roxborough*, 307 Mich. 575, 12 N.W. 2d 466 (1943) (41 defendants jointly tried for conspiracy); *People v. Rossi*, 270 App. Div. 624, 63 N.Y.S. 2d 4 (1946).

Thus, the principle and practice followed by the trial Judge here have been upheld by this Court, by the federal courts of appeals, by the appellate Courts of Pennsylvania, and in other jurisdictions generally.

8. The petitioners allege that high officials of the Commonwealth were used to present and interpret state law to the jury and further, that the petitioners were denied their right to effective cross-examination.

At the beginning of the trial, the Commonwealth called Harrington Adams, a Deputy Attorney General, who read into evidence Section 4 of the Act of May 21, 1937, P.L. 774, No. 211, 36 P.S. 652k which created the Pennsylvania Turnpike Commission and made it an instrumentality of the Commonwealth. Adams also read the provision of

Section 4 giving the Commission the power to contract, with the proviso that contracts relating to construction shall be approved by the Department of Highways and that such construction be under the supervision of the Department of Highways. Adams read further from the statutes the enacting law which created the northeastern extension of the Pennsylvania Turnpike and the law which gave the Commission the power to contract for its construction, subject to the same approval and supervision by the Department of Highways.

John R. Rezzolla, Jr., Chief Counsel for the Department of Highways, also testified to the statutes.

It is the general rule as contended by defendants that the trial Judge, not expert witnesses, should give instructions to the jury on domestic law and its application to the case. The witnesses did *not* give an opinion or interpretation of the laws as applied to this case. See *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 237, 238, 239 (1959).

6. Petitioners contend that the trial Judge forced petitioner Stickler, in front of the jury, to produce his company's business records for which the Commonwealth had subpoenaed the wrong person.

The Commonwealth issued a subpoena to Clyde J. Siegfried, Controller of Manu-Mine, to present certain corporate books and records. When the witness Siegfried was on the witness-stand, he was questioned as to whether he had such records. Counsel for Stickler volunteered that it was not desired that anything be concealed and that the records shown to be relevant would be produced. Accordingly, the Commonwealth asked that they be produced.

The privilege against self-incrimination does not extend to the corporate records here involved. "It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. A corporate officer may not withhold testimony or documents on the ground that his corporation may be incriminated. * * * Nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production." *Curcio v. United States*, 354 U. S. 118 (1957). The books and papers of a corporation are not the property of the officers and may be used against them. *McElree v. Darlington*, 187 Pa. 503, 595 (1898). That the colloquy between counsel and the trial Judge took place before the jury was brought about by Stickler's counsel, who interrupted the questioning of Siegfried relative to the subpoena by stating that the documents were in the possession of Stickler and that they would be produced if shown to be relevant. Counsel could "easily have made the remarks at sidebar beyond the hearing of the jury if it were so desired. The contention is without merit." *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 240, 241 (1959).

10. The petitioners complain that the trial Judge allowed the Commonwealth to present witnesses to the jury who testified about their own crimes and conspiracy which had no connection with the charges in the case.

During the course of the trial, petitioner Stickler and the witness Luke, Mann Mine's project engineer, testified in response to defendants' counsel's questioning, that no irregularities had occurred on the job with respect to the drilling and slushing activities. The Commonwealth in rebuttal produced witnesses who testified that such ir-

regularities did occur. Their testimony was limited by the trial Judge to attacking the credibility of Stickler and Luke. The determination of what is admissible on rebuttal is primarily for the discretion of the trial Court. The jury was carefully instructed that it was not evidence that any offense was committed by any of the defendants. The testimony of these rebuttal witnesses was to the effect that, as Manu-Mine inspectors, they had entered into an agreement to give fictitious weight slips for loads of silt not delivered and to look the other way when silt was dumped about the countryside, because the holes drilled by Manu-Mine would not take the flushing material. This evidence was thus relevant directly, in addition to rebutting Stickler and Luke, to show the failure of the drilling and supervising program of Manu-Mine to meet its ostensible purpose. As Judge Rhodes, in the Superior Court opinion, said, "The testimony of these inspectors was an elaboration upon and corroborative of that of Oswald which had been presented in the Commonwealth's case in chief. The testimony did not relate to a collateral matter but to one germane to the issue and it was proper to permit it in rebuttal. Where evidence would have been admissible in the Commonwealth's case in chief, it may properly be received in rebuttal for the purpose of contradicting the testimony offered by the defendant." *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 252, 253 (1959). The Fourteenth Amendment leaves the states free to adopt such rules of relevance. *Lisenba v. California*, 314 U. S. 219, 227 (1941). Cf. *United States ex rel. Thompson v. Price*, 258 F. 2d 918 (3rd cir. 1958), cert. denied 358 U.S. 922.

11. The petitioners contend that they were denied due process in that the trial judge was biased and unfair.

The short answer to this is best stated by President Judge Rhodes, writing for the majority in *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, at p. 208: "We conclude this opinion by referring to one other allegation of the defendants to the effect that the trial Judge was biased and unfair. This is devoid of merit. As a matter of fact, under the circumstances, he displayed unusual self control and forbearance. There were lengthy and repetitious objections by *fourteen* defense counsel during the trial, and at its conclusion, in support of their motions, they assigned nine hundred forty-one (941) reasons, and two hundred twenty-one (221) additional reasons were incorporated by reference. In the record of sixty-five hundred (6500) pages, we find no justification for the criticism by defendants of the conduct of the trial Judge. It is our conclusion that defendants had a fair and impartial trial, and that there was no violation of due process of law."

As said by Mr. Justice Frankfurter concurring in *Glasser v. United States*, 315 U.S. 60, 88 (1941): "It is a common place in the administration of criminal justice that the actualities of a long trial are too often given a mere pretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

CONCLUSION

The petitioners were ably represented by experienced counsel in every step of this case. The jury verdicts against them were upheld unanimously by the Dauphin County Court consisting of four judges; by a majority of the Pennsylvania Superior Court; on allocatur by a per curiam opinion of the Supreme Court of Pennsylvania af-

firming the Superior Court's decision on the opinion of President Judge Rhodes. The concurring and dissenting opinion of Justice Bell, joined in by Justice Benjamin R. Jones; sets forth in the first sentence that "A gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the northeastern extension of the Pennsylvania Turnpike for which a number of people have been convicted and duly sentenced." The sufficiency of the evidence to sustain petitioners' convictions is not questioned, and in fact it was overwhelming. The petitioners have not presented any substantial federal question. They had a fair trial, and were denied neither due process nor equal protection of the laws.

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 418

THOMAS J. EVANS, JAMES F. TORRANCE, CHARLES W. STICKLER and CLAYTON A. LANDSIDLE, *Petitioners*,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*

REPLY

Petitioners had hoped that when this case was presented to the highest tribunal of the land that the Commonwealth of Pennsylvania would abandon the sensationalism technique of prosecution which destroyed petitioners' basic rights in the lower courts. It was hoped that the Commonwealth would meet petitioners on the true issue raised here—whether petitioners received a fair trial.

But the Brief in Opposition shows that hope to have been both fond and foolish. Once again the irresponsible speech of the Pennsylvania Governor echoes forth and, in place of proof that a fair trial was had, comes the same mass of inflammatory generalities in an attempt to turn the eyes and minds of this Court away from the denial of justice, as the eyes and minds of the Pennsylvania juries and judges were turned.

Respondent Avoided the Issue and Misstated the Facts

In this spirit the Commonwealth took pains to quote twice the opening sentence of Justice Bell's concurring and dissenting opinion in the Supreme Court of Pennsylvania, *Commonwealth* v. *Evans, et al.*, 399 Pa. 387, concerning a "gigantic fraud". Neglected in the Brief in Opposition is the fact that Justice Bell went on to hold that at least two of the petitioners here did not have a fair trial.

What the Commonwealth cannot seem to grasp in connection with the so-called "gigantic fraud" is that it makes not one whit of difference whether one dollar or twenty million dollars are involved in this case. As previously stated the question is whether petitioners were accorded a fair trial within the ambit of their constitutional rights.

Even the honest efforts of accused men to save themselves before the bar of justice is represented to this Court as something to be weighed against them. At page 2 of the Brief in Opposition, the Commonwealth characterizes the retention of individual counsel as designed to obtain "a tactical advantage". Does the Commonwealth suggest that a single counsel should have been employed to defend nine men against upwards of 200 separate offenses in a seven week trial? Would that have been in the interest of justice?

At page 3 it is asserted that each petitioner's counsel argued before the Supreme Court of Pennsylvania. In fact, only three out of seven argued, and one of these had to make a special request for permission to do so. Finally, in closing its brief at page 23, respondent once again asks this Court to regard unfavorably the defendants' efforts to defend themselves by emphasizing

the number of the defense counsel and their vigorous efforts to defend.

The Commonwealth's brief is saturated with unfounded misstatements of fact and distorted representations of the law, although there is little of the latter. Petitioners, mindful of the extensiveness of the records and briefs already before this Court, wish only to point out the most unconscionable.

1. At pages 6 and 7, it is insinuated that some dishonesty was involved in the contract of July 7, 1954, in that it was extended, was for engineering, and was not bid. At no time has the good and honest performance of this contract ever been challenged with fact, but only by insinuation, and it is not and never has been involved in this case.

2. One Commissioner, Lawler, is said to have "relied on the assurances of (Commissioners) Evans and Torrance that Manu-Mine was a company with an international reputation in the field, and the only company qualified to do the work covered by the contract." (Br. Op. p. 8) Lawler made such a statement, but on cross-examination he explained his reason for voting in favor of the contract. "I depended upon the legal counsel, I depended on our engineering staff. I depended upon our consulting engineers. That is why the Turnpike has retained these people to advise and instruct us commissioners." (597r). At 602r he continued: "... That is why we have those people here. That is why we pay them such salaries ..."

3. In several places, respondent asserts that it was unnecessary to fill in, to flush silt into the abandoned mines that crisscross under the Turnpike, that the work was 90% to 95% unnecessary. Anyone who is

familiar with the frequent land collapses in the Pennsylvania coal regions knows this to be an irresponsible statement. In his dissent in the Superior Court in this case, Judge Watkins, an acknowledged expert, discusses the question in *Commonwealth* v. *Evans, et al.*, 190 Pa. Superior Ct. 179, at 288, et seq. He points out that a Commonwealth witness, Beaney, who testified that the work "for the most part, with the exception of two or three areas, was unnecessary . . . ," in June 1959 was one of three mine inspectors who reported to the Governor after a special study, that "It is our opinion that subsidences . . . will continue . . . and that the only solution . . . is a long range flushing program." The area involved was the same as that traversed by the Turnpike. Judge Watkins found the report to be a conclusive contradiction of the Commonwealth argument that after seven years an abandoned mine has settled as much as it ever will. At page 291, he says: "The report clearly indicates that there is always a danger of subsidence regardless of the length of time that has elapsed after the last mining or robbing." (See Record, Vol. XXI, 403e-407e for photographs of subsidence.)

4. At page 14 et seq., concerning the consolidation for trial, respondent blandly overlooks the conflict and mutual contradictions in the three different offenses which petitioners emphasized in the Petition:

Having skipped these crucial differences, respondent then casually cites *Schaffer* v. *United States*, 362 U.S. 511, and quotes from it. Petitioners call the Court's attention, and respondent's too, to the offenses there involved. All defendants in *Schaffer* were charged with the same offense: transportation of stolen goods.

How close is this to this case in which one indictment charges that two petitioners obtained the contract by the false pretense of deceiving the other two petitioners while another indictment charges the same two petitioners, charged with false pretense, of *conspiring with* the two "deceived" petitioners to obtain the very same contract? And in the *Schaffer* case, Justice Clark went on to "emphasize" in that case itself that ". . . the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice appears." 4 L ed. 2d 921, 925.

5. At page 16, Paul's attorney was *not* "given a copy of the transcript before the reading began." He received a few pages at a time from the prosecution during the testimony. See p. 2658r of the Record.

6. At pages 19-20, respondent asserts that Commonwealth witnesses Harrington, the Deputy Attorney General, and Rezolla, the Department of Highways General Counsel, did not interpret laws "as applied to this case" to the jury. The nice distinction attempted by the quoted words is meaningless. A reading of the testimony of these two men belies both the distinction and the assertion. Moreover, petitioners attacked the totality, i.e., the reading and interpretation of law, some of it inapplicable, by some of the highest Commonwealth legal officials. See Petition, pp. 23-24, 40-41.

7. At pages 21-22, respondent asserts that petitioner Stickler and Luke a Manu-Mine employee testified "no irregularities had occurred on the job." This is false. Both said they did not "know" of such irregularities. (4709r, 3291r). This was no basis for rebuttal witnesses as shown at page 44 of the Petition.

The few points covered above adequately show that the Commonwealth refuses to meet the true issue raised by the Petition, that it is proceeding now as it has done throughout this case. It has resorted to a strategy of sensationalism calculated to arouse and prejudice this Court by use of multi-million dollar figures and headline adjectives. And finally, it has not hesitated to misstate even facts that can be checked against the Record.

Petitioners respectfully request this Court to grant the writ of certiorari.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

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THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*.

PETITION FOR REHEARING

This Court denied certiorari in this case on November 21, 1960. Petitioners again contend that this Court should grant the writ on the constitutional grounds set forth in the original Petition, and because cases decided subsequent to the denial justify this Petition and provide substantial grounds for granting certiorari.

Petitioners are cognizant of the fact that this Court must carefully select the cases it will decide, not on the basis of individual hardship, but on the basis of the need of our system of justice for an authoritative decision that will result in greater justice for many individuals. Petitioners know that every case cannot be entertained, even if those involved have not been

afforded all possible Constitutional protection. But it is believed that this case falls within the class of cases in which a decision by this Court will assure petitioners of a fair trial and help draw definitive guidelines for other cases of a like nature. It is on this premise that petitioners now petition for a rehearing.

The contentions of petitioners can perhaps be best capsulized by quoting Chief Judge Woodbury of the First Circuit Court of Appeals in *Sampedro* v. *People of Puerto Rico*, 281 F. 2d 888, 893:

> "There is enough trial by newspaper in this country already. We shall not encourage that evil practice further by sanctioning oral confessions for the benefit of those elements of the press which seek to profit by pandering to the morbid craving for the sensational and sadistic."

What Judge Woodbury said should be applied with equal force to the unjust use of television by the Pennsylvania Governor in this case for political purposes.

It now appears that, had this trial occurred in a federal court in Pennsylvania, petitioners would have been spared the injustice caused by the irresponsible public condemnation by the Governor of Pennsylvania.[1]

On November 29, 1960, subsequent to this Court's denial of certiorari in this case, a Philadelphia news-

[1] Although this is a state case and the Fourteenth Amendment applies, the same constitutional safeguards for a fair trial as the Fifth Amendment provides for federal defendants are afforded. This Court in terminating the "silver platter" doctrine in *Elkins* v. *United States*, ... U. S. ...., 4 L. ed. 2d 1669, spoke clearly on this point.

paper headlined a story, appearing at page 31, of a trial[2] in the United States District Court in that city in this manner:

"2 Gamblers Called Tax Evaders"

The two defendants were on trial for violation of federal tax laws on betting. Judge C. William Kraft, Jr., upon motion by counsel for the defendants, granted a mistrial. He felt that the prejudice caused by the headline writer who had "assumed what the government has undertaken so laboriously to try to prove . . . ," would deny the defendants a fair trial. He felt that he was obliged by the decision of this Court and the Court of Appeals to declare the mistrial rather than send a case into appellate tribunals, that were bound to reverse it.[3] (App. pp. 3a and 4a)

Judge Kraft explained his action in these words:

> "The decisions of those Courts are clear that it is the duty of the trial judge to be extremely circumspect in endeavoring to see that the defendant has a trial which is essentially fair and free from any prejudicial sidelights because, as I tried to make clear to you yesterday, the purpose of a trial such as this is to resolve the guilt or innocence of a defendant or defendants not upon what the people surmise or what is said in the newspapers or upon anything except what is the evidence produced in the courtroom, which is the time and the place to produce it. But human beings as we are, and subject to the human frailties to which all of us are in lesser or greater degree subject—we do read newspapers, we listen to radio, we watch tele-

[2] U. S. v. Minker, et al., No. 20368, United States District Court for Eastern District of Pennsylvania.

[3] The transcript of the proceedings mentioned are printed in the Appendix hereto.

vision, and with the right of the free press the Court is powerless except in very unusual circumstances to prevent printing what the press regards as legitimate news." (App. p. 3a et seq.)

If that same case were in the Pennsylvania state courts no mistrial would have been declared, because the decision in petitioners' case stands unchallenged and is authority for far greater license to newspapers, television and radio.

Consider how the rights of petitioners were prejudiced. Their indictment and trial were almost buried with publicity and they were on two occasions on television denounced by the Governor of the State as swindlers and thieves, as examples of Republican dishonesty and graft.[4] The Pennsylvania State courts did not so much as blink their judicial eyes at this exhibition of political football. Compare this with the Minker case, in which a federal court acted firmly to destroy any possibility of prejudice caused by some unknown headline writer. These two cases show that there exists in Pennsylvania for persons accused of

[4] Tape recordings of TV broadcasts lodged with the Clerk of this Court. The Governor's first remarks about petitioners in his first telecast were:

"You've seen the headlines—you'll see more. Investigation meanwhile goes on. The latest example of how the Republican leaders did business is the Turnpike scandal. A special Grand Jury is now investigating this development. We're proud of our Turnpike, justifiably so. It's one of the great highways of the world. And we have a right to be angry that anyone would use it to swindle. Yet this has been done. Certain people set out to steal $20,000,000 from it and they got $9,000,000 before we could stop them. Their front was a company called Manu-Mine Research and Development." (Tr. 17a)

crime, a dual standard of the constitutional right to a fair trial.[5]

Ill-advised publicity caused by public officials was severely criticized by the Court of Appeals for the Second Circuit when it overturned the convictions in the so-called Apalachin cases[6] on November 28, 1960. Both the majority opinion and the concurring opinion had something to say about the "unusual and disturbing publicity" that accompanied the trial and investigation and even continued during the appeal due in great part to writings in the public press by former prosecutors in the case.

Chief Judge Lumbard, in the majority opinion, viewed the "hue and cry" raised by newspaper, magazine, and television expressing "the suspicions of governmental authorities that it was a meeting of underworld overlords and their vassals, commonly credited with being members of the Mafia, called for various unknown but illegal purposes" as an ample reason why the defendants were most reluctant to explain their presence at the meeting. He regarded this as just as likely as the government position that the defendants had conspired to conceal the illegal purposes of the meeting.

Judge Clark, concurring, spoke also for his two brother judges, when he stated that publications by

[5] It is petitioners' understanding that a case closely analogous to this case was argued before the Third Circuit Court of Appeals *en banc* on October 17, 1960, and now awaits decision. (*United States* v. *Carlucci*, et al., Nos. 13136-12141, 13162) It would have bearing on the principle involved in this case.

[6] *United States* v. *Bufalino, et al.*, No. 357, October Term, 1959, Docket No. 26194, United States Court of Appeals, 2nd Circuit, ... F. 2d .....

former special prosecutors while the appeal was pending were "improper". He deemed it an unfortunate feature of the case that it "was given unusual and disturbing publicity in newspapers, journals, and magazines". Judge Clark intimated that the tenor of the publicity—that law enforcement faced a crisis and "crash methods" resulting in imprisonment of the defendants were welcome and justified—may have encouraged the prosecution that should "never have been initiated or allowed to proceed so far".

There is a real need for this Court to speak definitively on the problem of publicity and its influence upon the processes of justice both state and federal. This Court with this case has the opportunity to act effectively to alleviate the growing problem about which Mr. Justice Douglas observed in his August, 1960 article, *The Public Trial and the Free Press*, (46 A.B.A.J. 840, 841):

> ". . . The television trial may produce evidence to convice the witness; and *it may so saturate the country with prejudice against an accused that a fair trial may be next to impossible. . . .*" (Emphasis added)

The Minker case and the Apalachin Cases are typical of the effect that misuse of public media of communications can have upon an accused's chance for a fair trial. Notoriety in publications and in television can be especially devastating to justice when it is precipitated or encouraged by public officials who deem it necessary to make their views of a case universally known to the public. Petitioners were victims of this type of prejudicial notoriety. And the unusual departures from ordinary forms of justice at the trial, which were enumerated in the Petition, can be in large

part attributed to the atmosphere thus intentionally created by the Pennsylvania Governor. The unwarranted publicity, which Judge Clark suggested in the Apalachin Cases caused a prosecution that "should never have been initiated", in petitioners' case inspired the prosecution to resort to devices ordinarily not countenanced in American courts.

These "devices" have been fully described to this Court in the Petition, but one bears repeating in this Petition for Rehearing, because of its relation to the prejudice caused by the Governor, the highest official in the State.

Two other top State officials, the Deputy Attorney General and the Chief Counsel of the Highway Department, took the witness stand and presented the law of the case to the Jury. Petitioners have argued persistently that such testimony was an outright usurpation of the judicial function, and that they were thereby deprived of judicial supervision of their trial. But the point that petitioners wish this Court to consider now is the relation of this complete departure from the usual practice in Pennsylvania to the position that the Governor had previously taken when he televised his opinions in the case. The jury knew that their Governor wanted convictions and then two other important State officials told them what law was applicable. In fact, the law testified to was incompletely interpreted to them and part of it was wholly inapplicable. This faulty legal foundation for the Commonwealth case received the approbation of the trial judge and was given by witnesses of most impressive legal and official standing. It is to be doubted that the jury even regarded these men as witnesses; they had every ap-

pearance as official authorities on law to be respected in the same manner as the judge.[7]

This Court early considered how a law may be proved in court and warned against the use of a witness when the official text of the law itself was available. In *Ennis* v. *Smith*, 14 How. 400, 426-7, the Civil Code of France was involved in settling the will of General Kosciusko, and this Court quoted Lord Campbell on the problem of how the Code should be proved:

> "'The most authentic form of getting at foreign law, is to have the book which lays down the law.' Thus, we have had the Code Napoleon in our courts. It is better than to examine a witness, whose memory may be defective, and *who may have a bias influencing his mind upon the law*:" (Emphasis added)

That the case was concerned with the proof of a foreign law does not detract in any way from the caution expressed by this Court and Lord Campbell which has been italicized in the part quoted. Both witnesses used by the Commonwealth to give the Pennsylvania law to the jury were subject to suspicion of bias. Both were appointees of a Governor who had publicly broadcast his judgment in this case. Both, moreover, had the special influence upon their minds caused by their official positions: one as the Deputy Attorney General hopeful for a successful prosecution by his office, the

[7] In this regard, the use of these "official" witnesses to give their views of the law, one of whom could as easily have been prosecuting the case as testifying, is extremely similar to the improper conduct of a prosecutor who airs his views of the case in the public press or similar media, and should be equally condemned. The impropriety of public expression of a prosecutor's views in the press was considered in the concurring opinion of Justices Harlan and Frankfurter in *Ciucci* v. *Illinois*, 356 U.S. 571, 573.

other as the Highway Department Chief Counsel hopeful of an interpretation of the law that would subject the Turnpike Commission to his department's control, an interpretation expressly contrary to a statute provision[5] he omitted from his testimony.

CONCLUSION

Petitioners ask this Court to reconsider their case in the light presented by this Petition for Rehearing, and, in particular with reference to stand taken by the United States District Court in the *Minker* case. That Decision raises the question whether defendants in criminal cases in the Federal courts in Pennsylvania receive higher Constitutional protection than their counterparts in the state courts. There should be one standard for both: a fair trial not subject to public prejudice aroused by irresponsible use of newspapers, magazines, radio, or television.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

PEYTON FORD
Attorney for Appellants.

[5] At p. 24 of the original Petition, 36 P. S. § 670-103 is quoted. It excludes "(a)ny law administered by the Pennsylvania Turnpike Commission" from the operation of the Highway Department Act.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 20368

UNITED STATES OF AMERICA

v.

ABRAHAM MINKER, also known as ABE MINKER, and JOHN A. WITKOWSKI, also known as JOHN A. WITTIG

Philadelphia, Pa., November 29, 1960

Before Hon. C. WILLIAM KRAFT, JR., J., and a jury

Present: WALTER E. ALESSANDRONI
United States Attorney, and

ROBERT J. THOMPSON
Assistant U. S. Attorney
for the Government.

JACOB KOSSMAN, ESQ.,
for the defendants.

SECOND DAY

Mr. Kossman: May we approach the bench?
The Court: Yes.

(The conference at side bar was as follows:)

Mr. Kossman: There appeared in the Philadelphia Inquirer in all editions, this statement, which says "Two gamblers called tax evaders."

Now, they have no right to call Mr. Minker a gambler. He has never been locked up in his life, never. Now, this appeared in all editions in which they said, "Two gamblers called tax evaders, two alleged number racketeers."

The Court: I have not seen the article so let me look at it.

(Page 31 of the Philadelphia Inquirer dated Tuesday Morning, November 29, 1960, was handed to the Court.)

Mr. Kossman: I feel that the paper—it is the only morning newspaper of general circulation and I think that most of the people on the jury must have seen it, they read a paper, and that it is obviously so prejudicial that I am going to ask for a mistrial based on a statement of that type.

I remember Your Honor has had some occasion involving newspaper publicity some time ago.

The Court: What have you to say, Mr. Alessandroni?

Mr. Alessandroni: Of course, the Government is not responsible for what the newspapers print.

The Court: We realize that.

Mr. Alessandroni: I have no knowledge that the jury has read it and I don't know that if they did read it that it would in any way be prejudicial.

These two persons are being charged as gamblers and it is a serious criminal offence and this is what the Government intends to show.

Mr. Kossman: It is one thing to say two people are charged with being gamblers, it is another thing to say "two gamblers."

Then they talk about alleged racketeers.

(End of side-bar conference.)

The Court: Members of the jury I inquire of you whether any of you have read the article appearing in the Philadelphia Inquirer of Tuesday morning, November 29, 1960, that is today, respecting the case and the defendants now on trial.

Will you raise your hands, please. Just keep them raised a moment.

(Some jurors raise their hands.)

The Court: Jurors 3, 4, 5, 6, 8, 9 and 10.

We direct that the copy presented by defendants' counsel in support of his motion be marked as Exhibit D-1 and filed as part of the record in this proceeding as the paper which was offered in support of that motion.

(Page 31 of the Philadelphia Inquirer of Tuesday morning, November 29, 1960, was marked Exhibit D-1 for identification.)

We will ask the bailiff for the present to withdraw the jury and I should like to hear argument by counsel in chambers on the question of the pending motion.

(Recessed from 10:08 a. m. until 10:25 a. m.)

(Jury reenters the courtroom at 10:26 a. m.)

The Court: After hearing further argument of counsel on the motion made on the defendants' behalf for mistrial, we grant the motion, withdraw a juror and declare a mistrial.

Members of the jury, you may wonder about it, you may think that it is unnecessary, that none of you were or could be prejudiced in your consideration of the case by the article, but we are bound by the decisions of the United States Supreme Court and the Court of Appeals for this Circuit.

The decisions of those Courts are clear that it is the duty of the trial judge to be extremely circumspect in endeavoring to see that the defendant has a trial which is essentially fair and free from any prejudicial sidelights because, as I tried to make clear to you yesterday, the purpose of a trial such as this is to resolve the guilt of innocence of a defendant or defendants not upon what the people surmise or what is said in the newspapers or upon anything except what is the evidence produced in the courtroom, which is the time and place to produce it. But human beings as we are, and subject to the human frailties to which all of us are in lesser or greater degree subject—we do read newspapers, we listen to radio, we watch television, and with the right of the free press the Court is

powerless except in very unusual circumstances to prevent printing what the press regards as legitimate news.

In this case much of the article would be unprejudicial, merely recitation of fact, but unfortunately some headline writer apparently decided he didn't have enough space to print his headline and represent the actual facts so he announced in broad, bold, black type that these two men were gamblers. Whether they are or not, I don't know. The Government contends that they are and the burden of proof is on the Government to prove that as part of its case by evidence beyond a reasonable doubt.

Why the headline writer assumed that which the Government has undertaken so laboriously to try to prove, I don't know, except it might appear that the word "accused" or "suspected" or "alleged" contained too many letters to fit into the headline, and tied in with the body of the article was the phrase "numbers racketeers." Of course, they are accused in this case of being persons engaged in accepting number bets or wagers.

The word "racketeer" in idiom today connotes something a little more than a person who takes a bet.

There is nothing we can do, as I have said, about what is published in the newspaper.

It is lamentable with the effort that the Government has put forth, with the attendant expense to the taxpayers to make this investigation, and the labors of the United States Attorney and his assistant who are, of course, wholly blameless in this situation—they are as powerless as are you and I—with all the effort they have put forth to prepare their case and subpoena their witnesses and be prepared to go forward with the trial, that such a thing has happened. And equally the defendants have been called upon to, of course, engage counsel. I assume his time is not to be without reward. They have had to prepare themselves for the trial of this case in which they contend that they are not guilty of the crimes of which they are accused, and they are also put in the position that they are deprived of having their day in court.

It is unfortunate but it is our view that under the law it is essential that we grant the motion that was made, and for that reasons we have granted it because it would seem utterly purposeless to us to take the time of all of counsel and of all of the parties and witnesses in this case, and your time and mine, for a trial of ten days, two weeks or possibly longer, and have a determination by you of the defendants' guilt or innocence, and then if you found the defendants guilty to have the inevitable appeal based, among other things, on this very ground, and to have the Court of Appeals then set aside all that had been done.

If what is undertaken to be done is now aborted, it strikes me that it is better aborted at the outset than after all the labors have been put forth at length, some believed result achieved and then have it all thrown out.

We are sorry that your time has been wasted, as we are sorry that our time has been wasted because this is a busy court. We thank you for your services in the case and excuse you now from further service in it and you will withdraw to the jury room from which you were selected.

The court will stand in recess and I should like to see counsel, and I would ask defendants' counsel to ask his clients to remain so that if there is to be discussion of a future trial date that we can try to see what can be resolved in that direction at this time.

Mr. Alessandroni: If Your Honor please, could the Government request that all exhibits be returned to the Government.

The Court: The court reporter is directed to return and make proper notation on the record of the return of the exhibits heretofore marked and admitted in evidence or heretofore marked, not admitted in evidence but in the reporter's possession.

Mr. Alessandroni: Thank you, sir.

(Government Exhibits 1, 1A, 2, 3, 4 and 5 were returned to Mr. Thompson. Exhibits G-6 and 7 at this time are in the marshal's office and under his control.)